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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 426

B. D. McCAUGHN, COLLECTOR, PETITIONER

vs.

HERSHEY CHOCOLATE CO.

No. 427

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

HERSHEY CHOCOLATE CO.

No. 428

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

HERSHEY CHOCOLATE CO.

No. 429

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

HERSHEY CHOCOLATE CO.

No. 430

B. D. McCAUGHN, COLLECTOR, PETITIONER

vs.

HERSHEY CHOCOLATE CO.

No. 431

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

HERSHEY CHOCOLATE CO.

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1930
CERTIORARI GRANTED OCTOBER 20, 1930

(35348, 35349, 35350, 35351, 35352, 35353)

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In United States District Court, Eastern District of Pennsylvania

June term, 1926. No. 12360

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE

Docket entries

F. Lyman Windolph, J. E. Snyder, Wm. Clarke Mason.
George W. Coles.

Aug. 6, 1926. Præcipe to issue summons filed.

Aug. 9, 1926. Summons exit—returnable first Monday in September, 1926.

Aug. 12, 1926. Statement of claim filed.

Aug. 12, 1926. Notice to file affidavit of defense filed.

Aug. 24, 1926. Summons returned "Served 8/13/26" and filed.

Aug. 26, 1926. Appearance of George W. Coles for defendant filed.

Sept. 16, 1927. Affidavit of defense filed.

Feb. 27, 1928. Stipulation to try case before court without a jury filed.

Mar. 20, 1928. Præcipe to place case on argument list, filed.

May 21, 1928. Trial before court without a jury.

May 22, 1928. Trial resumed—witnesses sworn.

June 7, 1928. Plaintiffs request for findings of fact and conclusions of law filed.

June 7, 1928. Argued sur P. & P.

June 13, 1928. Testimony filed.

Nov. 22, 1928. Opinion, Kirkpatrick, J., holding that judgment may be entered for defendant, filed.

2 Nov. 22, 1928. Finding of fact and conclusions of law filed.

Nov. 22, 1928. On motion of counsel for plaintiff, reargument ordered for December 4, 1928.

Nov. 26, 1928. Copy of oral argument filed.

Dec. 4, 1928. Re-argument sur findings of fact.

Jan. 17, 1929. Opinion, Kirkpatrick, J., directing that the opinion filed November 22, 1928, be withdrawn to be changed in certain particulars relative to facts, but that the conclusions reached in said opinion will not be changed, filed.

Jan. 22, 1929. Opinion filed November 22, 1928, withdrawn and revised opinion filed.

Jan. 26, 1929. Plaintiff's exceptions filed.

Jan. 26, 1929. Plaintiff's bill of exceptions and order of court sealing same filed.

Apr. 22, 1929. Præcipe to enter judgment filed.

Apr. 22, 1929. Judgment in favor of defendant filed.

May 17, 1929. Assignments of error filed.

May 17, 1929. Petition for appeal filed.
May 17, 1929. Order of court granting appeal filed.
May 17, 1929. Precipe for transcript of record sur appeal filed.
June 10, 1929. Bond sur appeal and order of court approving same filed.
June 10, 1929. Citation allowed and issued.
June 10, 1929. Copy of notice of appeal filed.
June 11, 1929. Citation returned "Service accepted" and filed.

3 In United States District Court

[Title omitted.]

Plaintiff's Statement of Claim

Filed August 12, 1926

Hershey Chocolate Company, the above-named plaintiff, complaining of the above-named defendant, brings this action against Blakely D. McCaughn, United States collector of internal revenue for the First District of Pennsylvania, the defendant above named, to recover the sum of $1,512,460.38 with interest which plaintiff avers is justly due and owing to it upon a cause of action whereof the following is a statement:

1. The plaintiff at all the times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, is a citizen and resident of the State of Pennsylvania, having its principal place of business at Hershey, in the county of Dauphin, in the Middle District of Pennsylvania, and is and was at the times herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all the times hereinafter mentioned was the United States collector of internal revenue for the First District of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located at all the times hereinafter mentioned; the defendant maintained an office for the transac-
4 tion of business in the city of Philadelphia, and is a citizen and resident of the city of Philadelphia, in the Eastern District of Pennsylvania.

3. During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers, certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of nine million one hundred and fourteen thousand three hundred and forty-five 47–100 dollars ($9,114,345.47), and during the period from January 1, 1922, to December 31, 1923, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of thirty-five million two hundred and forty-one thousand seven hundred and two 71–100 dollars ($35,241,702.71),

making the total selling price of sales during the period from June 1, 1921, to December 31, 1923, both dates inclusive, the sum of forty-four million three hundred and fifty-six thousand and forty-eight 18–100 dollars ($44,356,048.18).

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), and under and by virtue of the authority of the revenue act of 1921, Title IX, section 900 (subdivision 6), did, for the period aforesaid, assess excise taxes against the plaintiff on the amount of the said sales hereinbefore stated aggregating one million five hundred and twelve thousand four hundred and sixty 68–100 dollars ($1,512,460.68).

5. In order to avoid the imposition of threatened penalties prescribed by the commissioner of internal revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, a tax of one million five hundred and twelve thousand four hundred and sixty 68–100 dollars ($1,512,460.68), being five per centum (5%) of the amount of said sales for the months of June, July, August, September, October, November, and December, in the year 1921, to wit, the sum of $455,717.28, and being three per centum (3%) of the amount of said sales for the whole of each of the years 1922 and 1923, to wit, the sum of $1,057,251.06, less the sum of five hundred and seven 66–100 dollars ($507.66) deducted therefrom for overpayments made, as follows:

Date of payment	Month for which paid	Amount paid	Date of payment	Month for which paid	Amount paid
July 29, 1921	June, 1921	$58,420.90	December 26, 1922	November, 1922	$44,491.90
August 29, 1921	July, 1921	52,901.47	January 29, 1923	December, 1922	50,497.25
September 29, 1921	August, 1921	62,824.10	February 28, 1923	January, 1923	45,273.83
October 29, 1921	September, 1921	93,215.97	March 30, 1923	February, 1923	46,593.62
November 29, 1921	October, 1921	46,190.57	April 30, 1923	March, 1923	58,875.37
December 28, 1921	November, 1921	55,692.09	May 29, 1923	April, 1923	46,096.39
January 28, 1922	December, 1921	40,104.58	June 30, 1923	May, 1923	49,745.57
February 27, 1922	January, 1922	23,418.61	July 31, 1923	June, 1923	34,283.17
March 28, 1922	February, 1922	30,849.74	August 30, 1923	July, 1923	30,560.63
April 29, 1922	March, 1922	5,169.43	September 29, 1923	August, 1923	58,744.26
May 29, 1922	April, 1922	28,284.72	October 29, 1923	September, 1923	76,483.43
June 29, 1922	May, 1922	36,294.08	November 28, 1923	October, 1923	68,957.46
July 28, 1922	June, 1922	25,502.23	December 28, 1923	November, 1923	52,764.69
August 29, 1922	July, 1922	30,645.70	January 30, 1924	December, 1923	57,304.90
September 29, 1922	August, 1922	42,107.04			
October 28, 1922	September, 1922	58,491.84			1,512,460.68
November 28, 1922	October, 1922	66,078.84			

6. The respective revenue acts of 1918 and 1921 aforesaid did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate nor upon "tea, coffee, and cacao products."

7. The sweet chocolate and sweet milk chocolate manufactured and sold by plaintiff, as hereinbefore stated, upon the sales of which

plaintiff paid a tax to defendant involuntarily and under protest, as hereinabove stated, are the product of cacao (cocoa) beans, which are the seeds of the cacao tree, roasted, broken, and freed from husks, shells, and germs without the removal of other constituents.

8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists of the United States and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

9. The definitions and standards of purity for food products, including cacao products, established and officially promulgated by the Secretary of the Department of Agriculture of the United States are set forth in a Circular No. 10, dated, viz, November 20, 1903; in Circular No. 13, dated December 20, 1904, superseding Circular No. 10; supplementary Circular No. 17, dated March 8, 1906, and Circular No. 19, dated June 26, 1906, superseding Circulars Nos. 13 and 17; in all of which circulars sweet chocolate, including therein sweet milk chocolate, was defined as the solid or plastic mass obtained by grinding cocoa nibs without removal of fat or other constituents except the germ, mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. The definitions and standards in force as of May 14, 1919, continued in force during the period when the sales heretofore referred to were made by the plaintiff, set forth in circular No. 136 of the United States Department of Agriculture, dated May 14, 1919, superseding but in continuation of the earlier Circulars Nos. 10, 13, 17, and 19 on the same subject to the same effect, contain the following:

(Circular No. 136, page 18)

"B. TEA, COFFEE, AND CACAO PRODUCTS"

"C. CACAO PRODUCTS"

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty-hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber, or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

"10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber, or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

10. The said definitions and standards of purity for food products promulgated and published by the Secretary of the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under which classification is included "candy," and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "c. Candy," which is therein defined as "a product made from a saccharine substance or substances."

11. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products including cacao products for the United States of America, and the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to are legal standards of purity, classification, and definitions of food products for the United States of America.

12. The tax paid by plaintiff to defendant as aforesaid was collected by defendant wrongfully, illegally, and without warrant in law, and to the damage of plaintiff.

13. The plaintiff, in accordance with the provisions of law and the acts of Congress in that regard and the regulations of the Secretary

of the Treasury thereto appertaining, on or about April 16, 1923, September 17, 1923, and March 12, 1924, respectively, viz, on April 16, 1923, for the payments made for the month of June, 1921, to and including the month of December, 1922, and on September 17, 1923, for the payments made for the months of January, 1923, to and including the month of July, 1923, and on March 12, 1924, for the payments made for the month of August, 1923, to and including the month of December, 1923, duly filed in the office of the collector of internal revenue at Lancaster, Pennsylvania, for transmission to the Commissioner of Internal Revenue, its claims for refund for payment to it of the amounts of the said taxes, paid as aforesaid, erroneously, wrongfully, and illegally collected. The said claims for refund were transmitted to the Commissioner of Internal Revenue and identified by him by the numbers Nos. 301063, 301064, 301065, 301069 to 301076, both inclusive, 301079 to 301082, both inclusive, 301086, 301092, 301093, 301094, 314997 to 315003, both inclusive, 328744, 328745, 328747, 328748, and 328749. On or about January 23, 1926, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the said claims for refund of one million five hundred twelve thousand four hundred and sixty 68-100 dollars ($1,512,460.68) were rejected. A copy of the said notice of rejection is attached hereto as Exhibit A.

14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

15. This is a suit of civil nature at common law, and the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000); this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

16. Wherefore the plaintiff says that the defendant is indebted to it upon an oral contract, to wit, a contract implied in law, in the sum of one million five hundred and twelve thousand and four hundred and sixty 68-100 dollars ($1,512,460.68) with interest on the several items hereinabove set forth making up the said amount from the aforesaid several dates of payment under protest, and demands judgment against the defendant for that amount with costs.

F. Lyman Windolph,
Attorney for Plaintiff.

Office and post-office address: 14 South Duke Street, Lancaster, Pennsylvania.

John E. Snyder,
Attorney for Plaintiff.

Office and post-office address: Hershey, Pennsylvania.

[*Duly sworn to by Ezra F. Hershey; jurat omitted in printing.*]

12 *Exhibit "A" to statement of claim*

TREASURY DEPARTMENT,
Washington, Jan. 23, '26.

OFFICE OF COMMISSIONER OF INTERNAL REVENUE

Address reply to Commissioner of Internal Revenue and refer to MT: ST: LCN Cl.–301063, etc.

HERSHEY CHOCOLATE COMPANY,
Hershey, Pennsylvania.

GENTLEMEN: Reference is made to the following claims filed by you for refund of manufacturer's excise tax alleged to have been erroneously paid on the sale of sweet chocolate as candy:

Claim No.—	Amount of claim	Claim No.—	Amount of claim
301063	$50,545.70	301092	$58,491.84
301064	88,824.10	301093	56,420.90
301065	33,418.51	301094	44,491.90
301069	56,576.54	314997	45,277.58
301070	32,861.47	314998	40,980.62
301071	40,104.58	314999	58,875.37
301072	25,502.23	13 315000	46,096.39
301073	36,234.08	315001	49,745.57
301074	26,834.72	315002	34,256.37
301075	36,160.45	315003	30,556.62
301076	30,627.28	328744	52,765.69
301079	95,215.97	328745	37,204.94
301080	30,849.74	328747	56,744.38
301081	55,699.69	328748	76,483.43
301082	36,590.57	328749	68,957.46
301086	43,107.04		

Sweet chocolate and sweet milk chocolate are held to be properly subject to tax as candy under the provisions of both the revenue acts of 1918 and 1921.

Since you have presented no evidence showing what portion, if any, of the amount of tax claimed is applicable to chocolate which is held by this office not to be taxable as candy, the claims are rejected in full.

Respectfully,
D. H. BLAIR,
Commissioner.

KTC-FBN.

In United States District Court

[Title omitted.]

Affidavit of defense

Filed September 16, 1927

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

Blakely D. McCaughn, being duly sworn according to law, deposes and says that he is the defendant named in the above-
14 entitled case, and that he has full, just, true, and legal defense to the whole of plaintiff's claim, of the character and nature as follows, to wit:

1. Admitted.

2. Admitted.

3. Defendant has no information as to the allegations contained in the third paragraph of plaintiff's statement of claim, nor has he any means of ascertaining whether the facts therein stated are true or not, and he therefore calls for strict proof thereof.

4. Admitted.

5. Defendant admits that the payments as set forth in paragraph 5 of plaintiff's statement of claim were made, but avers that he is informed, believes, and expects to be able to prove at the trial of this case that the plaintiff separately billed to its customers as taxes the taxes referred to, and that the plaintiff collected from, and was reimbursed by, its said customers the taxes alleged to have been paid by the plaintiff to the collector of internal revenue.

6. It is averred that paragraph 6 of plaintiff's statement of claim is a conclusion of law and therefore needs not be answered. Defendant nevertheless avers that sweet chocolate and sweet milk chocolate manufactured by the plaintiff are subject to the tax provided by the revenue acts of 1918 and 1921.

7. Defendant has no knowledge of the averments in paragraph 7 of the statement of claim, and if plaintiff deems them necessary to the issue involved, proof thereof is demanded.

8. Defendant avers that the averments contained in paragraph 8 of plaintiff's statement of claim are immaterial, and if plaintiff deems the same necessary for the determination of the issue involved, proof thereof is demanded. It is averred that whatever standards, definitions, and/or classifications may have been established as set forth in said paragraph 8, they are not relevant or authoritative in interpreting the revenue laws of the United States nor were they intended to be so used.

9. The averments of paragraph 9 of plaintiff's statement of claim are immaterial to the issue involved. The definition and standards of purity of food products as set forth in said paragraph 9 of plaintiff's statement of claim are not relevant or authoritative in determining what is taxable under the provisions of the revenue laws.

10. The averment in paragraph 10 of plaintiff's statement of claim are irrelevant and immaterial.

11. Defendant denies that the standards of purity, definitions, and/or classifications established as set forth in paragraph 11 of the statement of claim are relevant to the issue involved or of any authority or value in determining the same.

12. All the taxes paid by the plaintiff to the defendant as set forth in plaintiff's statement of claim were properly and lawfully due and owing the said defendant under the revenue laws then in force.

13. Admitted.

14. Admitted.

15. Admitted.

16. Wherefore there is no contract, either express or implied, or any other cause of action based upon law or fact whereby the defendant is indebted to the plaintiff in any sum whatsoever.

BLAKELY D. McCAUGHN,
Collector of Internal Revenue for the First District of Pennsylvania.

Subscribed and sworn to before me this 15th day of September, 1927.

[SEAL.] ANTHONY T. MITA,
Notary Public.

My commission expires March 2, 1929.

16 In United States District Court

[Title omitted.]

Stipulation waiving jury

Filed February 27, 1928

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the Court without the intervention of a jury, in accordance with Sections 649 and 700 of the United States Revised Statutes.

GEORGE W. COLES,
United States Attorney.
JOHN E. SNYDER,
F. LYMAN WINDOLPH,
Attorneys for Hershey Chocolate company, Plaintiff.

PHILADELPHIA, PA.

17 In United States District Court, Eastern District of Pennsylvania

June term, 1926. No. 12360

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

*Opinion of the court**

Filed November 22, 1928

KIRKPATRICK, J.:

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were insti-

* NOTE.—This opinion (filed November 22, 1928), for which the revised opinion of January 22, 1929, was substituted, was changed by the latter in the following particulars only:

(a) The sentence, "This decision had been appealed from and the case was pending in the Circuit Court of Appeals," appearing in the 9th and 10th lines of page 20, was omitted from the revised opinion.

(b) The words "the pending," appearing in the 4th and 5th lines from the bottom of page 20, were omitted from the revised opinion.

(c) The words "concededly not an eo nomine description," appearing in the 15th and 16th lines of page 25, were omitted from the revised opinion.

See pages 32 to 41, both inclusive, for revised opinion.

tuted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9), of the revenue act of 1918, and Title IX, sec. 900 (6), of the revenue act of 1921, and all the suits involve the general question whether certain sweet-chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

18 The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same, except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918 sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or
19 almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed up and offered under various

names. Some of the names given by the plaintiffs to their products are: Solid Chocolate Bon Bons, "Chocolate Kisses," "Chocolate Delights," "Sweet Milk Chocolate Pats," "Chocolate Cigarettes," "Croquettes," "Buds," "Wafers," "Almond Bars," and the like. One of the plaintiffs describes the article as "a confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. This decision had been appealed from and the case was pending in the Circuit Court of Appeals. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet

chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question." (Andrews v. Hovey, 124 U. S. 694, 716.) This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on the pending appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. (U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.)

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one, coming very close to being compelling, and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section," and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff acts of March 8, 1883, the classifications are "sugar candy," "all other confectionery," and "chocolate." In the war revenue act of 1866 they are "sugar candy," "all confectionery made wholly or

in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

22 The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence (13 Howard 274), in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe (13 Wallace, 163), and other cases.

These decisions announce a well-established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. (See Taylor v. Treat, 153 Federal, 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 182 U. S. 655.)

Concluding, therefore, that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved can not be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in 23 which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." (Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485.) A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly

attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." (Endlich's Interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.)

Certainly the word candy has never acquired a technical or scientific definition, and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use, and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of
Congress, and of the word confectionery, which is of broader
24 meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F–80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal, 404), and varying conclusions have been reached.

Curiously enough, both parties insist that the meaning of the term is clear and unambiguous (and therefore not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker Company

(281 Fed. 41) (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before
25 it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term concededly not an eo nomine description, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said: "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include as to
26 exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed oper-

ation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these, there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite directions, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case, and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

27 In United States District Court

[Title omitted.]

Findings of fact

Filed Nov. 22, 1928

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

Conclusions of law

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff, and on which the excise taxes involved in this action

were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the court:

W. H. KIRKPATRICK, *J.*

28 In United States District Court, Eastern District of Pennsylvania

June term, 1926. No. 12360

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Opinion sur reargument.

Filed January 17, 1929

KIRKPATRICK, J.:

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above-entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court, in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company, stated that at the time the act of 1921 was passed this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8, on page 5, will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

29

II

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases:

"In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact; other than those first above referred to are denied, except in so far as the facts are stated in the opinion referred to."

The objections are, first, that the above manner of finding facts is not proper practice, and, second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge, and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of proper practice in stating the fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by re-stating as a part of his findings of fact, word for word, what he has already stated in the opinion.

30 As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel

Company v. United States, handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say: "If Congress has been accustomed to use a certain phase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think it was either the intention or the effect of the opinion in that case to abrogate the well-established rule that where a word is not a technical word but one of general popular usage, with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all. The act there under consideration was a special act allowing a suit in ad-
81 miralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure, and in its interpretation the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy," however, we have just the opposite situation. Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co. #94, October term, 1928) the general rule referred to is re-affirmed. The court said: "Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression, or absurdity (United States v. Goldenberg, 168 U. S. 95, 103), or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in other acts of Congress. That matter was considered fully, and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the

statute. The conclusion reached was that the later considerations were the more important and controlling ones.

The conclusions reached in the opinion filed will not be changed.

By the court:

W. H. KIRKPATRICK, J.

32 In United States District Court, Eastern District of Pennsylvania

June term, 1926. No. 12360

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Opinion of the court (as revised)

Filed January 22, 1929

KIRKPATRICK, J.:

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9), of the revenue act of 1918, and Title IX, sec. 900 (6), of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

The relevant provision of the revenue act of 1918 is as follows: "That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

33 The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918 sweet chocolate "sold in large packages not as candy but intended for further manufac-

turing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 3, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "Solid Chocolate Bon Bons," "Chocolate Kisses," "Chocolate Delights," "Sweet Milk Chocolate Pats," "Chocolate Cigarettes," "Croquettes," "Buds," "Wafers," "Almond Bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing
35 article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question." (Andrews v. Hovey, 124 U. S. 694, 716.) This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. (U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.)

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one, coming very close to being compelling, and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts, but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In
36 these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet

chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nominee been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section," and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery," and "chocolate." In the war revenue act of 1866 they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence (13 Howard 274), in which case the Supreme Court said: "* * * For when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe (13 Wallace 162) and other cases.

37 These decisions announce a well-established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. (See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132, U. S. 655.)

Concluding, therefore, that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved can not be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record, which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the

language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton V. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485.)

A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is that it is to be assumed that the words and phrases are used in their technical
38 meaning if they have acquired one and in their popular meaning if they have not * * *." (Endlich's Interpretation of Statutes, sec. 2. See De Ganay v. Lederer (250 U. S. 376).

Certainly the word candy has never acquired a technical or scientific definition, and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; In re Schilling, 53 Fed. 61; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S., U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal, 404), and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and therefore not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is
39 one consideration of great value in matters of interpretation which will not take us outside of the act itself, though

it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker & Company (281 Fed. 41) (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said: "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair

meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical
41 and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

42 In United States District Court

Bill of exceptions

Caption

Be it remembered, that in the said term of June, 1926, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff de-

clared (prout statement) and the said defendant pleaded (prout plea). And thereupon issue was joined between them.

And thereafter by stipulation filed of record on the 27th day of February, 1928, it was "stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes."

And afterwards, to wit, at a session of the said court, held in the district aforesaid before the Honorable W. H. Kirkpatrick, judge of the said court, on the 21st day of May, 1928, the said issue between the said parties came to be tried by the court without a jury, at their respective attorneys; and upon the trial, the witnesses being which day came as well the said plaintiff as the said defendant by duly sworn or affirmed, the following testimony was produced:

43 TRANSCRIPT OF TESTIMONY AND RULINGS

[Title omitted.]

Before KIRKPATRICK, J.

Philadelphia, Pa., Monday, May 21, 1928, at 10.00 o'clock a. m., eastern daylight saving time.

Present: William Clarke Mason, Esq., F. Lyman Windolph, Esq., and John E. Snyder, Esq., for plaintiff; R. W. Wilson, Esq., and Mark Thatcher, Esq., for defendant.

Plaintiff's evidence and stipulated facts

Mr. MASON. If your honor please, in cases brought by the Hershey Chocolate Company against B. F. Davis, formerly collector, Nos. 10726 and 10824, and in cases brought by the Hershey Chocolate Company against Ephraim Lederer, formerly collector, Nos. 10822 and 10826, we ask leave to file stipulations amending the name of the defendant by substituting "executrix" in each case, both of those defendants having died and executrixes having been appointed. In the case of B. F. Davis we substitute "M. Louisa Davis" as the executrix of the estate of the said B. F. Davis, deceased, and in the case of Ephraim Lederer we substitute "Grace N. Lederer" as the executrix of the estate of Ephraim Lederer, deceased.

If your honor please, if I may, before starting the proof, I will outline to you, in a very brief way, just what the problem of procedure is that we have here, and ascertain whether it meets with your honor's approval.

44 There are sixteen cases all told, three of them in which the Wilbur-Suchard Chocolate Company is plaintiff, four in which the Klein Chocolate Company is plaintiff, three in which the York Chocolate Company is plaintiff, and six in which the Hershey

Chocolate Company is plaintiff; all of them against the collector of internal revenue in office at the time the taxes were paid, and all of them for the payment to the plaintiffs of moneys paid by the manufacturers for excise taxes upon candies under the act of 1918 and 1921.

Counsel for the Government and counsel for the plaintiffs have found in these cases that, so far as we can see in advance of the proof, substantially all of them involve the same questions. There may be some variations, however, in the proofs in relation to the products of one manufacturer that will not be the same as the proofs in relation to the products of other manufacturers, and on the assumption that that difference may arise, and to protect the record, which is being made in so many cases, tried together, the plan which we propose is this, sir: That the admitted facts in the record of pleadings be put upon the record in each one of the sixteen cases, that the documentary proof, in so far as it is general—and I think it will be general as to all of them—be offered as to all of the cases; that means as to each of them be offered at the one time; that when it comes to oral proof the witness, when called, shall be called as a witness in the case of one or the other plaintiffs, and that his testimony shall be taken as though given in each of the cases for that particular plaintiff, but as to no others until his testimony is concluded along the particular line in which the examination and cross-examination is desired; that at the end of the examination of that particular witness, counsel will then indicate—presumably by agreement—whether, in addition to the testimony being taken for the cases of one of the four plaintiffs, it shall also be taken for the cases of the other three plaintiffs.

The COURT. At the conclusion?

45 Mr. MASON. At the conclusion of that testimony, and we will then indicate, for the record purposes, how far beyond the original call the testimony shall be extended, in order that not only the court and counsel may have an appreciation of the record facts for the several cases, and the limitation of them, but that the stenographer, in making the record for us, will be guided at that time in the reference to the extent to which that testimony is to be applied, and we expect, sir, that by so doing we will not only be able to keep these cases and the record of them clearly in line, but that we will be able substantially to save the time of the court and expedite the trial.

The COURT. How many records are you going to make?

Mr. MASON. Our thought——

The COURT. That is surely a way to save time, but what are you going to do about the record?

Mr. MASON. Our thought, sir—we will make our records, and at the end of the hearings before your honor, if all of the testimony is general, we will ask that one record be made up for your honor's consideration and the consideration of counsel.

The COURT. If all the testimony——

Mr. MASON. If all of the testimony applies to all of the cases.

The COURT. For instance, if you call a witness in the three Wilbur cases, and all the testimony applies to all of them——

Mr. MASON. We will make up the one record.

The COURT. Suppose you call a witness in Wilbur, and Klein says that his testimony is applicable to him, and Hershey says no, then you will have to make a separate record?

Mr. MASON. Then there will be separate records made, but when I speak of making up one record at the end of the testimony I mean one record preliminarily. Of course, there will be eventually, in all probability, a complete transcript of all of the cases. We will endeavor to so present it that you will not have in the pre-

46 liminary stage of consideration of these cases more than the one record, except where certain testimony is applicable to certain cases only, and in that event, of course, a separate record will be made up for those cases.

Now, sir, pursuant to the agreement made with counsel for the Government and counsel for the plaintiffs, in the opening we desire to offer in evidence those facts set forth in the sixteen statements of claim which have been admitted by the affidavit of defense or by consent of counsel.

The COURT. Have you copies of those statements?

Mr. MASON. I am going to give your honor a copy of each one, and to state to your honor that on the face of each statement of claim there is marked by lead-pencil bracket, on the outside margin, the admitted facts. In several of the paragraphs there are internal brackets, which relate to words in those paragraphs to be excluded, and we shall ask that the stenographer note, for the purposes of the record, in each case those portions of the statement of claim which are indicated as I have stated, and include them as a part of the record of each case from the pleadings and admissions of counsel as facts admitted in these cases with the same force and effect as if they had been otherwise proved.

For the purpose of the record, may I say this: That in all of the statements of claim where reference is made in language similar to the language in the case of Wilbur-Suchard Company against Grace N. Lederer, No. 10774, to the standards for food products and the definitions of the same, set forth in that statement of claim in paragraphs 7, 8, and 9, the Government—while the pleadings admit the facts as stated in those paragraphs are true—desires to note an objection, and will press and argue the objection to your honor on the admissibility of these facts relating to those standards in these cases, and I call the attention of your honor, for record purposes, that that objection is to be noted wherever those paragraphs appear in the record of each of the cases.

In addition to the numbered paragraphs in each of the
47 sixteen cases, to which reference is made for the admitted facts, I also offer in evidence the letters attached to the several statements of claim as exhibits in each of the cases to which the letters appear as exhibits, from the Department of Internal Revenue, in which there is set forth the fact that claims for refunds made have been rejected. Those letters are admitted to have been sent by the department and received by the plaintiffs, and are part of the records of these cases.

So that your honor and all of us on this side of the bar will appreciate just what is involved by these admissions, I call your honor's attention to a typical case, and I am reading from Wilbur-Suchard, No. 10774. The first paragraph sets forth the identity of the plaintiff and the second the identity of the defendant. The third sets forth the fact that during the period in question the plaintiff sold to its customers sweet chocolate and sweet milk chocolate having a selling price of the amount therein set forth. Those sales will not be made evident by the details of the records. They have been examined and covered by counsel for both parties, and the facts are admitted.

The fourth paragraph sets forth the assessment of the excise tax under the revenue act of either 1918 or 1921.

The fifth sets forth the fact that, under protest, the returns were made and the tax paid.

The seventh, eighth, and ninth paragraphs are the paragraphs setting forth the fact that under the act of Congress of June 3, 1902, and supplements, the Secretary of Agriculture established standards of purity for food products, classified the same, and defined those which are set forth in the classification.

The tenth——

The COURT. He says that he is authorized to establish standards and to classify, but where does he say he defines them?

Mr. MASON. We set forth the fact, sir, that the standards of purity
48 of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to statutory authority, are the official standards of such food products for the United States of America.

The COURT. Yes.

Mr. MASON. Then, in paragraph ten, the admitted fact is that there is no authority vested by act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America.

The twelfth provides that we have complied with the required regulations and statutory proceedings to claim our refund, and that the refunds were denied, and that the refund of the tax, as made, has been refused.

Your honor, therefore, has before you the admitted facts in this case, with the Government's objections to the relevancy of the stand-

ards, and if Mr. Thatcher deems it well, we might dispose of that question now, so that we may have your honor's thought about it.

Mr. WILSON. If your honor please, it is admitted, as alleged in the various statements of claim of all these cases, that the Department of Agriculture has been given authority, under the act of Congress, to establish and maintain standards and classifications of food products. We have no quarrel with that proposition at all.

The Government contends that in the instant cases these allegations relating to the authority of the Secretary of Agriculture are immaterial and irrelevant, by virtue of the fact that, under the act of Congress of 1918 and also of 1921, the Commissioner of Internal Revenue was given express authority to promulgate such rules and regulations as would be reasonable, and would amount to a reasonable interpretation and application to all subjects taxed under the revenue acts. The Congress did not attempt, at the time of the passing of those acts, to add any interpretation of any words used.

In section 900, Subdivision IX, we find the single word "candy."

Under that section 900 an excise tax, manufacturer's excise
49 tax of 5 per cent, will be levied on candy, and, pursuant to that section, the commissioner, by virtue of the authority vested in him by Congress, proceeded to define "candy" and to levy this tax of 5 per cent on products which come within that definition.

The COURT. What is it the Department of Agriculture defines?

Mr. WILSON. The plaintiffs in these cases having alleged in paragraphs 7, 8, and 9—they have dealt somewhat with the history of the congressional act, under and by virtue of which the Secretary of Agriculture has been given authority to establish standards of purity for food products, and, as I say, we do not dispute that——

The COURT. Yes, sir; but what does it say? I have not read it. In what way does the Department of Agriculture define it?

Mr. WILSON. The Department of Agriculture has issued certain circulars, which are quoted verbatim in these statements of claim, in paragraph 8, wherein it is alleged that the standard of purity for food products was in force May 14, 1919.

The COURT. They put sweet chocolate under the head of——

Mr. WILSON. By the Department of Agriculture sweet chocolate is considered under the head of subdivision "E. Tea, coffee, and cacao products."

The COURT. Yes; all right. It does not happen to be under candy?

Mr. WILSON. No; in the Department of Agriculture it is handled under "Sugars and related substances."

The COURT. Go ahead.

Mr. WILSON. And our contention is that these allegations are wholly immaterial to the issues in this case by virtue of the fact that Congress has, in its revenue acts, specifically designated a certain product which it says shall be taxed and defines that product, and names it as "candy," and pursuant to that congressional act the commissioner has set up a definition for taxation purposes in which

the words "milk chocolate" and "sweet chocolate" shall be used and defined as "candy."

50 It is our contention that whatever authority the Department of Agriculture may have, it is wholly immaterial. We do not deny it, but we do not see where it has any place in these cases. The fact that in the Department of Agriculture "candy" and the other term that was used, "sugars and related substances," are in a separate and distinct classification, may be changed, does not take away from Congress, in 1918, the right to say that a certain product, "candy," may be taxed, nor does it take away from the Commissioner of Internal Revenue, under the authority that is vested in him by the internal revenue acts, the right to so treat sweet milk chocolate.

Mr. MASON. With your honor's permission and with the consent of the Government, in view of the argument that has been advanced by Mr. Wilson, I am going to amplify the offer.

The COURT. How are we on the record? Has this offer been objected to on the ground that it is immaterial?

Mr. MASON. As I understand, the Government has objected to the admission of paragraphs 7, 8, and 9 in the case that I read from, and to the other statements in the other cases of a similar nature, on the ground of irrelevancy.

In view of the fact that it was my purpose later to elaborate those averments by offering the full circulars—the standards and the definition—so that the record would be complete, I will offer these now, and I understand the Government makes the same objection.

Mr. WILSON. Yes.

Mr. MASON. The Government makes the same objection to those offers, and I will direct my answer to the Government's objection.

The offer, which is now made, is the offer of the—

Circular No. 10, issued by the Department of Agriculture on November 20, 1903, entitled "Standards of Purity for Food Products";

Circular No. 13, issued by the Department of Agriculture on December 20, 1904, entitled "Standards of Purity for Food Products";

51 Circular No. 17, issued by the Department of Agriculture on March 8, 1906, entitled "Standards of Purity for Food Products";

Circular No. 19, issued by the Department of Agriculture on June 26, 1906, entitled "Standards of Purity for Food Products";

Circular No. 120, issued by the Department of Agriculture on May 14, 1919, entitled "Standards of Purity for Food Products";

A certified copy of what is entitled "Food Inspection Decision 135 (generally known as "F. I. D."), issued by the Secretary of Agriculture, February 15, 1916; and

A similar food inspection decision, No. 191, issued by the Department of Agriculture, January 19, 1923.

(Papers in question marked "Plaintiff's Exhibit 1 to 7," respectively, both numbers inclusive.)

Mr. MASON. Those include a statement and make reference to the authority on which action was taken by the Secretary of Agri-

culture, and form the basis for the promulgation of those circulars and decisions.

That authority goes back to the act of June 3, 1902, which is to be found in 32 Statutes at Large, 286, on page 296, in which Congress states: That the authority was given and the appropriation was made, as set forth in that act, to enable the Secretary of Agriculture, in collaboration with the Association of Official Agriculture Chemists and such other experts as he may deem necessary, to establish standards of purity for food products, and to determine what are regarded as adulterations therein for the guidance of the officials of the various States and of the courts of justice.

Pursuant to that authority, the Secretary secured the assistance of various official bodies, those who participated in the compilation of the standards and the definitions being referred to in the official documents issued by the Secretary, and included in them was Dr. Charles A. Crampton, chemist for the Bureau of Internal Revenue, as well as the representatives of the various organizations
52 throughout the country, competent to express opinions concerning the products covered by the regulations, and competent to aid in making a definition for them.

Your honor will find in these official documents that there is given the classification to "chocolate" in the regulations, that were in force at the time the act of 1918 was passed, and "candy" which clearly differentiates the two products, and having been so classified, and having been defined, as you will see in those regulations, we have, by authority of Congress itself, a designation for the one and for the other, which separates them as different things, and those classifications having been made pursuant to the authority given by Congress in 1902, being in force in 1918, being compelled upon all the other departments concerned with the law applicable to the subject matter of the regulations, they are offered here as evidence to establish the fact that at the time the act of 1918 and the act of 1921 were passed, there was in the mind of Congress, as a result of the action taken pursuant to this authority, a clear distinction between "candy" and "sweet chocolate," and for that reason and for the further reason that not only was Congress thereby guided, but as the acts themselves said, they were for the guidance of the courts of justice—and we are now in a court of justice—we think it is most appropriate that they should be made a part of the record in this case, as an aid to determining what is the meaning that Congress gave to the word "candy" when it adopted that designation as the basis for classification and taxation.

The Court. The ruling of the court will be reserved on this question. Proceed with the case.

(Copies of the paragraphs in plaintiff's statement of claim, heretofore referred to, follow:

"1. The plaintiff at all the times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, is a citizen and resident of

the State Pennsylvania, having its principal place of business
53 at Hershey, in the county of Dauphin, in the Middle District of Pennsylvania, and is and was at the times herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

"2. The defendant at all the times hereinafter mentioned was the United States collector of internal revenue for the first district of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located at all the times hereinafter mentioned; the defendant maintained an office for the transaction of business in the city of Philadelphia, and is a citizen and resident of the city of Philadelphia, in the Eastern District of Pennsylvania.

"3. During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of nine million one hundred and fourteen thousand three hundred and forty-five 47–100 dollars ($9,114,345.47), and during the period from January 1, 1922, to December 31, 1923, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of thirty-five million two hundred and forty-one thousand seven hundred and two 71–100 dollars ($35,241,702.71), making the total selling price of sales during the period from June 1, 1921, to December 31, 1923, both dates inclusive, the sum of forty-four million three hundred and fifty-six thousand and forty-eight 18–100 dollars ($44,356,048.18).

"4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), and under and by virtue of the authority of the revenue act of 1921, Title IX, section 900 (subdivision 6), did, for the period aforesaid, assess excise taxes against the plaintiff on the amount of the said sales hereinbefore stated aggregating one million five hundred and twelve thousand four hundred and sixty 68–100 dollars ($1,512,460.68).

54 "5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest, to the defendant, as collector of internal revenue as aforesaid, a tax of one million five hundred and twelve thousand four hundred and sixty 68–100 dollars ($1,512,460.68), being five per centum (5%) of the amount of said sales for the months of June, July, August, September, October, November, and December, in the year 1921, to wit, the sum of $455,717.28, and being three per centum (3%) of the amount of said sales for

the whole of each of the years of 1922 and 1923, to wit, the sum of $1,057,251.06, less the sum of five hundred and seven 66-100 dollars ($507.66) deducted therefrom for overpayments made, as follows:

Date of payment	Month for which paid	Amount paid	Date of payment	Month for which paid	Amount paid
July 30, 1921	June, 1921	$58,420.90	Dec. 26, 1922	November, 1922	$44,491.90
August 29, 1921	July, 1921	32,961.47	55 Jan. 29, 1923	December, 1922	30,627.26
September 29, 1921	August, 1921	88,824.10	Feb. 26, 1923	January, 1923	45,277.53
October 29, 1921	September, 1291	95,215.97	March 30, 1923	February, 1923	46,800.63
November 29, 1921	October, 1921	88,690.57	April 30, 1923	March, 1923	48,875.37
December 28, 1921	November, 1921	55,699.69	May 29, 1923	April, 1923	46,096.39
January 28, 1922	December, 1921	40,104.56	June 30, 1923	May, 1923	49,745.57
February 27, 1922	January, 1922	33,418.51	July 31, 1923	June, 1923	34,285.57
March 28, 1922	February, 1922	30,849.74	August 30, 1923	July, 1923	30,556.62
April 29, 1922	March, 1922	36,160.45	September 29, 1923	August, 1923	56,744.38
May 29, 1922	April, 1922	26,884.72	October 29, 1923	September, 1923	76,483.43
June 29, 1922	May, 1922	36,234.08	November 28, 1923	October, 1923	68,957.46
July 28, 1922	June, 1922	25,502.23	December 28, 1923	November, 1923	52,765.60
August 29, 1922	July, 1922	30,545.70	January 30, 1924	December, 1923	47,294.94
September 29, 1922	August, 1922	43,107.04			
October 28, 1922	September, 1922	55,401.84			1,051,460.66
November 28, 1922	October, 1922	56,576.54			

"8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists of the United States and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

"9. The definitions and standards of purity for food products, including cacao products, established and officially promulgated by the Secretary of the Department of Agriculture of the United States are set forth in a Circular No. 10, dated, viz, November 20, 1903; in Circular No. 13, dated December 20, 1904, superseding Circular No. 10; Supplementary Circular No. 17, dated March 8, 1906, and Circular No. 19, dated June 26, 1906, superseding Circulars
56 Nos. 13 and 17, in all of which circulars sweet chocolate, including therein sweet milk chocolate, was defined as the solid or plastic mass obtained by grinding cocoa nibs without removal of fat or other constituents except the germ, mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. The definitions and standards in force as of May 14, 1919, continued in force during the period when the sales heretofore referred to were made by the plaintiff, set forth in Circular No. 136 of the United States Department of Agriculture, dated May 14, 1919, superseding but in continuation of the earlier Circulars Nos. 10, 13,

17, and 19 on the same subject to the same effect, contain the following:

"(Circular No. 136, page 18)

"'B. TEA, COFFEE, AND CACAO PRODUCTS'"

"'c. CACAO PRODUCTS'"

"'1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"'2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

"'3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"'4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty-hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"'5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"'6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber, or starch than is found in the sugar and fat-free residue of chocolate.

"'7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"'8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"'9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

"'10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat-free residue of chocolate.

"'11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product.'

"10. The said definitions and standards of purity for food products promulgated and published by the Secretary of the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of 'C. Sugars and related substances,' under which classification is included 'candy,' and the said

definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of 'c. Candy,' which is therein defined as 'a product made from a saccharine substance or substances.'

"11. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal to establish definitions, standards of purity, or classifications of food products including cacao products for the United States of America, and the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him theretofore
58 referred to are legal standards of purity, classification, and definitions of food products for the United States of America.

"13. The plaintiff, in accordance with the provisions of law and the acts of Congress in that regard and the regulations of the Secretary of the Treasury thereto appertaining, on or about April 16, 1923, September 17, 1923, and March 12, 1924, respectively, viz, on April 16, 1923, for the payments made for the month of June, 1921, to and including the month of December, 1922, and on September 17, 1923, for the payments made for the month of January, 1923, to and including the month of July, 1923, and on March 12, 1924, for the payments made for the month of August, 1923, to and including the month of December, 1923, duly filed in the office of the collector of internal revenue at Lancaster, Pennsylvania, for transmission to the Commission of Internal Revenue, its claims for refund for payment to it of the amounts of the said taxes, paid as aforesaid, erroneously, wrongfully, and illegally collected. The said claims for refund were tranmitted to the Commissioner of Internal Revenue and identified by him by the numbers Nos. 301063, 301064, 301065, 301069 to 301076, both inclusive, 301079 to 301082, both inclusive, 301086, 301092, 301093, 301094, 314997 to 315003, both inclusive, 328744, 328745, 328747, 328748, and 328749. On or about January 23, 1926, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the said claims for refund of one million five hundred twelve thousand four hundred and sixty 68-100 dollars ($1,512,460.68) were rejected. A copy of the said notice of rejection is attached hereto as Exhibit 'A'.

"14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

"15. This is a suit of civil nature at common law, and the matter in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars ($3,000); this suit and the cause of action herein set forth arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

59 *Exhibit "A"*

TREASURY DEPARTMENT,
Washington, January 25, '26.

OFFICE OF COMMISSIONER OF INTERNAL REVENUE

Address reply to Commissioner of Internal Revenue and refer to MT:ST:ION CL-301063, etc.

HERSHEY CHOCOLATE COMPANY,
Hershey, Pennsylvania.

GENTLEMEN: Reference is made to the following claims filed by you for refund of manufacturer's excise tax alleged to have been erroneously paid on the sale of sweet chocolate as candy:

Claim No.—	Amount of claim	Claim No.—	Amount of claim
301038	$30,545.70	301092	$58,491.84
301064	88,824.10	301093	56,420.90
301065	33,418.51	301094	44,491.90
301069	56,576.54	314907	45,277.53
301070	32,861.47	314908	46,860.62
301071	40,104.58	314939	58,875.37
301072	25,502.23	60 315000	46,096.39
301073	36,284.08	315001	49,745.57
301074	26,884.72	315002	34,285.37
301075	36,160.45	315003	30,556.62
301076	30,627.28	328744	52,765.60
301079	95,215.97	328745	37,204.94
301080	30,849.74	328747	56,744.38
301081	55,699.69	328748	76,483.48
301082	80,590.57	328749	66,957.46
301083	43,107.04		

Sweet chocolate and sweet milk chocolate are held to be properly subject to tax as candy under the provisions of both the revenue acts of 1918 and 1921.

Since you have presented no evidence showing what portion, if any, of the amount of tax claimed is applicable to chocolate which is held by this office not to be taxable as candy, the claims are rejected in full.

Respectfully,

D. H. BLAIR,
Commissioner.

KTC-FBN.

Mr. MASON. In order that we will have here for record purposes a reference to the statements under consideration, sir, I will call your honor's attention to the revenue act of 1918, Title IX, section 900, subdivision (9), to be found in 40 Statutes at Large, 1157, page 1122, that section, as it stands, reading "Candy, 5 per cent."

The provision of the revenue act of 1918, under this title, imposing the taxes that were provided for in the various following sections and subdivisions, reads—as I shall give it to your honor in just a minute—"That there shall be levied, assessed, collected, and paid upon

the following articles sold or leased by the manufacturer, producer, or importer a tax-equivalent to the following percentages of the price for which sold or leased," that language being the lan-
61 guage with which Title IX, section 900, starts, subsection (9) of that section providing the percentage for candy as 5 per centum.

In view of the fact that, in addition to the act of 1918, these cases involve the provisions of the act of 1921, we call your honor's attention to certain legislative history of the act of 1921, and we desire to offer in evidence, so that it may be upon the record, even though your honor may take judicial notice, this is to have it available for record purposes, the proceedings of certain hearings before the Senate Finance Committee, engaged in the work of promulgating the act of 1921. We offer in evidence a certified copy of so much of the public hearings before the Senate Finance Committee, held May 9 and May 27, 1921, which relates to the proposed tax on candy, as set forth on pages 697 to 703 of the printed reports of those proceedings, the certificate being made by Elmer W. Pratt, clerk of the Committee on Finance.

Mr. WILSON. What is the purpose of your offer?

Mr. MASON. Counsel for the Government asks us for the purpose of that offer.

The COURT. You did state that.

Mr. MASON. I tried to make clear that the purpose of this offer and the subsequent offers will be to try to establish the legislative history of the act of 1921.

The COURT. Surely.

(Paper in question marked Plaintiff's Exhibit 8.)

Mr. MASON. Your honor will recall that the act of 1918 provided for a tax upon candy. When the act of 1921 was under consideration as shown by this particular report, there were a number of witnesses who presented to the Senate Finance Committee the scope of the previous enactment and complained of the manner in which that statute had not reached competitive products, and among those who raised the question, that there was a failure by then existing legislation to equalize the taxation, by reason of the fact that certain products were taxed and certain products were not taxed, were the representatives of the National Confectioners Association,
62 called upon to speak for the candy manufacturers, and in the course of their presentation of the problem, which the candy manufacturers had under the then existing act, and in support of a request that there should be an equalization of competitive industries, the candy manufacturers called the attention of the Senate Finance Committee to the fact that sweet chocolate was a product in competition with candy, which was not then subject to taxes.

Your honor will find in the argument not only the general language used to show the manner in which chocolate and other products

competed with candy, but you will find the statement made, in the first instance, by Mr. Fuller, and, again, my recollection is, by Mr. Price that under the decision of the United States Court in Massachusetts it had been decided that the act of 1918, levying a 5 per cent tax upon candy, did not levy a tax of a similar amount or any amount upon sweet chocolate, which was a competitor of candy. That matter is brought to the attention of the Senate Finance Committee in this language; Mr. Fuller, speaking on page 699, says this:

"Many articles made from the same ingredients pay an excise tax when manufactured by candy manufacturers, but no specific taxes when manufactured by others, such as cake and cracker manufacturers. Examples of this are stuffed dates, with which you are familiar, fig-filled Newtons, salted peanuts, chocolate bars, etc.

"The United States District Court of Massachusetts has just held that sweet chocolate bars—not the bitter chocolate used by housewives for cooking—are not subject to the 5 per cent excise tax. These bars are universally sold in direct competition with candy paying the 5 per cent excise tax.

"These are the sort of bars to which I refer [indicating samples] and which you see sold constantly in drug stores and news stands.

"Senator WATSON. Was that question tested in the courts?

63 "Mr. FULLER. In the United States District Court of Massachusetts, Senator Watson.

"Senator DILLINGHAM. In that popular way they are sold as candy?

"Mr. FULLER. Yes, sir; and they are sold in competition with candies universally. These bars are universally sold, as I have stated, in direct competition with candy which pays the 5 per cent excise tax."

Page 701, Mr. Price, speaking also for the Manufacturers Association and as president of the National Candy Company, calls the committee's attention to the fact, in his words:

"It has been recently held by the Massachusetts courts that a chocolate manufacturer may take a piece of chocolate and put a nut in it and it is a food and not subject to tax. We take a nut and coat it with chocolate and it is subject to tax.

"All of these items come in direct competition with candy."

During the hearings upon the revenue act of 1921 the hearings before the House's Ways and Means Committee afford a part of the legislative history of that act, and we offer so much of the hearings of the Committee on Ways and Means—a report of which is certified to by Clayton F. Moore, clerk of the Committee of Ways and Means—as relates to the subject matter of the inquiry before your honor, and, reading from page 252 to page 253 of that report, I call your honor's attention to the fact that before the House's Committee of Ways and Means the representatives of the candy manufactures presented the same request to the House as they presented to the Senate for a protection to the candy manufactures from the

competition of products sold in competition with candy, and not bearing a tax, and emphasized the fact to the members of the Ways and Means Committee that chocolate—sweet chocolate, in the form sold in competition with candy, did not bear the excise tax. The language that I am reading is the language of Mr. Fuller, beginning on page 252:

64 "It had been my intention, gentlemen, but circumstances manifestly would not permit that, to erect here before you a counter such as you see in the small neighborhood stores, the general country stores, and the 5 and 10 cent stores, because that is where the great bulk of candy is sold, and I would put in that counter these various pieces of candy, in the form in which they are sold, bulk goods, marked as 120 count goods, three for a penny, two for a penny, and so on.

"Congressman FREAR. You are urging that they be taxed the same as on the candy, as I understand?

"Mr. FULLER. I would say, conversely, Mr. Frear, we are urging that we be not taxed when we are forced to sell our articles in competition with those articles; and I would put in that counter tops, toy ballons, squawkers, marbles, glass agates——

"Mr. FREAR (interposing). Baseballs and bats?

"Mr. FULLER. Yes, sir; and these other things that sell for a penny, or a nickel, or a dime. I wish, gentlemen, we could take a child into a store in your presence and give that child a nickel and you could see the child consume half an hour or an hour of the time of the proprietor of that store shopping. Gentlemen, the child is the champion shopper of the country, and he will determine then whether he is getting a penny's worth or a nickel's worth or a dime's worth of candy, or whether he is going to go out and buy something that is not paying any of these taxes, such as the tops or the squawkers or the marbles, or these other things."

The COURT. He is not interested in quality, but more in the quantity.

Mr. MASON. The most for the money.

The COURT. Yes; cough drops are very popular.

Mr. MASON. "I have already referred to the fact that many articles which are manufactured by candy manufacturers pay a tax, while the same articles can be manufactured and sold by bakers and cracker manufacturers without paying a tax. Furthermore, the United States District Court of Massachusetts has just held that the sweet chocolate bars—the small sweet chocolate bars with

65 which you are familiar—are not a candy, and that therefore they are not subject to this 5 per cent manufacturers' tax, and yet they are sold in all these stores, and at news stands, and on the trains, etc., in direct competition with candy.

"Mr. FREAR. Would it help matters if we taxed them?

"Mr. FULLER. It would help matters to this extent, Mr. Frear, it would put everybody on the same competitive level; but it would not

be fair for us to come here, I think, and suggest that you tax other items, because of the manifest criticism of an industry.

"Mr. FREAR. That is not the question. We have got to raise the taxes from some source, and we want to find out what your recommendations are.

"Mr. YOUNG. Your recommendation is to take it off your product.

"Mr. FULLER. Yes, sir.

"Mr. YOUNG. And if not, then you think it ought to be put on competitive products?

"Mr. FULLER. I do not like to say that, Mr. Young. I would much rather the committee would draw its own conclusions."

(Book in question marked "Plaintiff's Exhibit 9.")

Mr. MASON. Following that, your honor will take judicial notice of the fact, and from these reports you will see that the committees reported the act of 1921 in a form which should not include a tax upon sweet chocolate or sweet milk chocolate. There was, however, a plan in the act that as reported, as your honor will see from the various Congressional Records of that time, a change in the tax on candy, and a change that provided for a similar graduated tax based upon the price of candy, but referring to the products taxed as candy, and not as sweet chocolate, and not in conjunction with sweet chocolate, nor including sweet chocolate in it, the language being identical with the language of the act of 1918, in so far as that commodity is concerned.

The COURT. What kind of a tax is that?

66 Mr. MASON. They proposed a graduated tax that would ultimately impose a tax of ten per cent upon candy selling at a maximum price, but the commodity that was to be taxed was still candy with no additions to that word. There was considerable debate in the House and Senate as to whether or not the candy industry could stand more than the smaller tax, and there was a committee amendment proposed that would change the method of taxing, as originally suggested. That debate extended over some substantial period of time.

I desire to offer from those debates, as part of the legislative history of the act of 1921, so much of the debates as are reported in the Congressional Records for the 67th Congress, first session, as of Tuesday, November 1, 1921, being in volume 61, and to be found on page 7879, in so far as it relates to the subject matter of this hearing; the volume also carries a number; the volume carries 61, No. 144. The page to which I have reference is 7879, without reading the entire debate, sir. Following the general debate upon the quantum the tax on candy should cover, there was a discussion as to whether or not it covered certain commodities also, and on page 7879, in answer to inquiries made by Senator Reed of Missouri, who is always inquisitive, Senator La Follette stated: "Sweet chocolate is not taxed as candy at all. It is not candy and is not so taxed."

"Mr. REED. I thank the Senator. I am perfectly content to have the law stand as it is; but if we are going to vote on the other propo-

sition, I would like to have it voted on in the manner I have suggested."

I might say, sir, that Senator Reed had suggested an amendment to the committee amendment. Further on, in the same debate and reported on the same page, Senator Willis made this inquiry:

"Mr. President, I desire to ask the Senator from New York a question. I do not desire to be misunderstood in my attitude on this. I am in favor of the reduction of this tax, but what I can not understand is why the Senator's committee now proposes to make a larger comparative reduction in the higher grades of candy than is
67 proposed for the lower and cheaper grades of candy. Why should that be done?

"Mr. CALDER. Mr. President, in the committee I voted for the three per cent tax on all candies. I never agreed that ten per cent was wise, and I do not now, and in line with the statement of the Senator from Massachusetts (Mr. Walsh), in my opinion, it would be inequitable and would work a great hardship on the higher and better grades of candy if the ten per cent tax is levied.

"Mr. McLEAN. I call the attention of the Senator to the prime reason why those of us who are opposed to that amendment thought we ought not to tax the higher grades of candy. For instance, sweet chocolate is not taxed at all, but it comes in competition with chocolate candy, it answers practically the same purpose, so we felt that it was unfair to tax the chocolate candy and let the sweet chocolate monopolize the market.

"Mr. CALDER. That is another excellent argument.

"Mr. McLEAN. I think that is the prime reason.

"Mr. REED (from Missouri). Mr. President, it seems to me there is a peculiar dearth of argument here or else a plentitude that is so massive that I can not grasp it. The first appeal was for sweet chocolate for the soldiers who had marched in France some three years ago. That necessity does not exist any more. Now it is discovered that sweet chocolates are not taxed at all.

"Next we heard about the poor clerks and stenographers, who had to make their dinners off of it, and now an appeal that would wring tears from the eyes of a marble statue is made for the poor fellow who has had his whiskey taken away from him and is about to have his candy taxed. What a heart-rending thing it is when one contemplates it! Here is an old jag walking down the street with his tongue dry, longing for the thing that has passed away apparently forever, who goes into a candy store and buys a pound of candy which costs twenty cents, and which is taxed six mills, and that is to close the curtain on the window of his happiness, and he is to see the sunlight of joy no more. That is a funny argument."

68 In the course of the Senate hearing, sir, and the House, further debates took place, which we do not need to offer, because the next and substantially the important fact, showing the

contentions made for the reduction of the tax on candy from the proposed tax to the tax, which was subsequently made, of three per cent in 1921, instead of five per cent in the act of 1918, and showing how, as part of the history, that one of the controlling reasons that appears to have influenced the Senators in reducing the tax upon candy, was this contention, that other things did not bear the tax at all.

(The court here announced a recess of ten minutes.)

(The court, at 12:10 o'clock p. m., thereupon reconvened.)

Mr. MASON. Now, sir, we would like to follow the legislative history another step by offering in evidence, certified by the clerk of the Committee on Ways and Means, "Notes on the revenue act of 1918, submitted by the Secretary of the Treasury, without recommendation at this time," is the way in which the pamphlet is entitled.

The COURT. What is it, his message to the Ways and Means Committee?

Mr. MASON. His submission to the Ways and Means Committee on November 3, 1919, addressed to the chairman of the Committee on Ways and Means, Honorable Joseph W. Fordney, for the purpose of embracing in the history of the act of 1921 so much of the suggestions which, as the Secretary of the Treasury says, are not at that time recommendations as appear on page 34, in relation to section 900, subsection (9), tax on candy, reading as follows:

"This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.

"It has been suggested that the term 'candy' should be defined.

"The following definition of the term 'candy' is suggested:

"Strike out subdivision (9) and insert:

69 "Candy, 5 per centum. Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruits and nuts not specified in paragraph (b) of this subdivision, pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate-covered marshmallows, sweetened licorice not taxed as cough drops under section 907, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake, and pastries, bitter chocolate which needs addition of sugar before it becomes pleasing to the taste, nor glace or candied fruits purchased for and used in the manufacture of food products, such as ice cream, cakes, and pastries."

(Paper in question marked "Plaintiff's Exhibit 11.")

Mr. MASON. Then, we call your honor's attention and suggest the inclusion in the record of the provision of the act of 1921, as passed, Title IX, excise taxes, section 900, reading: "That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased: Subsection VI, candy, 3 per centum."

The COURT. That is the same as the act of 1918?

Mr. MASON. Exactly the same as the act of 1918, without the addition of the suggested definition which Secretary Glass said had been proposed, and without anywhere in the act of 1921 imposing a tax upon sweet chocolate or sweet milk chocolate, or using the general language to include such related subjects in the terms of candy or any other taxed substance under the act.

70 For the purpose of showing the intent of Congress in the use of the word "candy" and as an easy way of bringing previous legislation to your honor's attention, we have prepared here a legislative history beginning with the tariff act of August 10, 1790, showing the use of the words "candy," "chocolate," "sweet chocolate," and "sweet milk chocolate" by Congress; from that time down to the tariff act of September 21, 1922, including not only tariff acts but internal revenue acts, such as the war acts of the 1860's, and one of the later statutes combining the revenue and tariff provisions, and we submit it to your honor in this printed form, and suggest that in that form, for easy reference, it be added to the record. Of course, it is not necessary to offer in evidence acts of Congress, but as it happens to be an easy method of substituting a few pages for many volumes, we suggest that in the printed form, in which it is now presented to the court, that it be added to the record, without being copied by the stenographer. We will furnish sufficient printed copies to take care of the record in each case. I understand that that is not objected to by counsel. It will make it a little bit easier for you.

Mr. WILSON. No.

Mr. MASON. In line with the last suggestion, sir, and to make of easy access the content of the standards of purity of food products, which have been offered in evidence in bulk, we have excerpted the relevant parts of the various documents and put them in the same form that we will put the acts of Congress, and we will furnish to your honor, and for record purposes, printed copies of those also. Those show, from the various circulars and decisions of the Department heretofore offered, the definition and standards of candy and chocolate, sweet chocolate, and sweet milk chocolate in parallel columns, showing the way in which the department has handled it.

Mr. WILSON. Of course, our objection goes as to the materiality of that.

Mr. MASON. It is conceded that any objection that the
71 Government has made to the documents in full would, of

course, attach to this excerpted copy from those documents, and which is not intended as additional evidence. It is intended as an easy way of ascertaining what is in the original.

(Two papers in question marked "Plaintiff's Exhibits 12 and 13," respectively.)

Mr. MASON. That is the plaintiff's case in chief, and I may say at this time, in view of the fact that it was impossible for counsel for the Government and counsel for the plaintiffs to know just exactly how the case might move as to time, or just how far we would get on to-day, I have agreed with counsel for the Government that the Government witnesses might not be called until to-morrow, and for that reason they may not be here, and if they are not here, with your honor's permission, I will consent to an adjournment of the case until to-morrow morning, so that they may be ready.

Mr. WILSON. If the court please, our witnesses are practically all experts, and if we wanted to call them to-day they would not be ready. Subpœnas have gone out and they will not be here until to-morrow; so, with the permission of the court, we will ask that we adjourn until tomorrow.

The COURT. That is perfectly agreeable to me. Do you think that you will be finished to-morrow?

Mr. WILSON. It will be agreeable for us to start a little earlier.

The COURT. I do not like to burden counsel, because frequently you want to take care of your correspondence, but so far as I am concerned, nine o'clock is absolutely satisfactory.

Mr. MASON. If it suits my associates, it suits me.

The COURT. If you are all agreed, we will start at nine o'clock.

Mr. MASON. We are quite satisfied here. Your honor asked if the case would be concluded to-morrow. I would be hopeful that it would be. We have a number of witnesses for rebuttal that we may not be able to put on.

72 The COURT. I do not believe I will be able to sit on Wednesday. There is just one thing I am expecting, a telephone call that may or may not require me to go back to Easton to-night. If I have to go back to Easton to-night, who shall I notify in that event?

Mr. MASON. If your secretary will notify me, I will notify my associates. I will so arrange that all my associates are notified.

(Adjourned until Tuesday, May 22, 1928, at 9.00 o'clock a. m., daylight saving time.)

Evidence on behalf of defendant

Second day

Philadelphia, Pa., Tuesday, May 22, 1928, at 9.00 o'clock a. m., eastern daylight saving time.

Mr. WILSON. Before opening the defense, your honor, I would like to make a very brief preliminary statement as to the theory on which the defense is proceeding.

The COURT. You want this for the record?

Mr. WILSON. Please.

The COURT. All right.

Mr. WILSON. As stated by me yesterday, the Government contends that the Commissioner of Internal Revenue had full power and authority to make his definition of "candy"—the word having been used in the internal revenue acts of 1918 and 1921—providing such definition was reasonable and reasonably applicable to the subject.

At this time I would like to read into the record the definition promulgated by the Commissioner of Internal Revenue, and under which the taxes herein involved were collected. This definition was promulgated originally on May 1, 1919, by the Secretary of the Treasury, and is referred to as article 22 of the regulations. It originally read as follows——

73 Mr. MASON. Before you read it, may I ask, for the purpose of the record, whether Mr. Wilson intends to give the basis for that regulation at this time, in view of the fact that in another case the Government did give the basis for it, as the definition suggested by the National Confectioners Association, on behalf of the candy manufacturers, and that was its origin and that was the source from which the Commissioner of Internal Revenue obtained the basis for his definition?

I was wondering if that is to be offered in the record as part of the defendant's case, whether at the same time it ought not to have the history of it and the source of it, but that is for Mr. Wilson.

Mr. WILSON. Of course, the position of the Government in all of these cases is that the origin and the basis of this definition are wholly immaterial in these cases. We are proceeding on the theory that it is a legal, reasonable, and just regulation, promulgated under the authority duly vested in the Commissioner of Internal Revenue, and that the definition, as originally worded and as amended, is all we are interested in at this time.

The definition reads as follows, or read as follows:

"Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits, and nuts, glace or candied fruits and nuts, pop corn and other cereals and cereal products mixed or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops, and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, and all similar articles however designated. It does not, however, include cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glace or candied fruits at the time the goods are shipped or 74 sold (whichever is prior) has in his possession an order or

contract of sale with certificate of the purchaser printed thereon, or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer, and on which he has performed no further process of manufacture, the tax attaches only to such portions of the goods sold as have been manufactured by him."

On May 10, 1919——

The COURT. What was the date of the definition?

Mr. WILSON. The original definition was May 1, 1919. That is promulgated as article No.—I believe that will be article 22 under the regulation 45.

Mr. MASON. Forty-seven.

Mr. WILSON. On May 10, 1919, there was a ruling made by the commissioner, which I shall read. It is very brief.

"Sweet chocolate sold in parcels of such a size and shape that it is commonly purchased and consumed as candy by the general public is taxable as candy, but sweet chocolate sold in large packages, not as candy, but intended for further manufacturing purposes, is not taxable, provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes."

Now, article 22 was revised in December, 1920, to the extent that while still covering permanently sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, by the introduction of another paragraph excluded—

"Sweet chocolate, glace or candied fruits or nuts sold by the manufacturer used under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale that it will not be consumed in the form in which it is then sold."

75 So that the addition to or the amendment of the original definition did not affect sweet chocolate and sweet milk chocolate, except as to the forms sold where further manufacture was necessary or done.

Mr. MASON. Mr. Wilson, may I ask whether you are offering the ruling of the commissioner as of May 10, 1919, as a regulation authorized by the statute?

Mr. WILSON. In answer to the inquiry of counsel, with regard to the ruling of May 10, 1919, which I quoted——

The COURT. What was the inquiry?

Mr. MASON. I inquired as to whether or not Mr. Wilson was offering the ruling of the Commissioner of Internal Revenue of May 10, 1919, as an authorized ruling of the Treasury Department or as a mere interpretative opinion of the commissioner. If it is offered as 1st, then I want to object because it is not an authorized ruling of

the Secretary, and if the second, I will object to it because it has not the weight of the commissioner's opinion.

Mr. WILSON. It will be offered under the second designation of counsel. In other words, what we offer is an office ruling.

Mr. MASON. My reason for making that distinction at this time is because the act of 1918, section 1309, and the act of 1921, section 1303 gave, in these words, the only power that the department had to make regulations "that the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act." There is no provision in either act permitting the Commissioner of Internal Revenue or the Secretary of the Treasury to make a definition of an article taxed by Congress.

The COURT. What was the original regulation?

Mr. MASON. The original regulation was section 22 of article 47, under the act of 1918, which was issued by the commissioner with the approval of the Secretary. That was authorized by the Secretary, but there is no foundation in the act for a ruling by the commissioner in the nature of a definition of the word "candy."

78 Mr. WILSON. Reference was made on several occasions yesterday by counsel, while reading from papers and documents introduced in evidence by him, to a certain case in Massachusetts, in which a decision for the plaintiff company had been entered shortly prior to the discussions which were taking place in the House and the Senate relative to this particular measure. The following remarks will be off the record.

(Remarks off the record.)

Mr. WILSON. If your honor please, there are certain labels and some advertising matter which [illegible] upon between counsel may be admitted in evidence, and these have been put in groups; these are in the Hershey case only; the labels applying to the same product, but in different sizes. We are grouping them under one group.

The COURT. What are they?

Mr. WILSON. They are labels of the——

The COURT. Just hand them up, so I can see, in a general way, what you are talking about.

Mr. WILSON. Wrappers for the different-sized products.

The COURT. Yes; I see. All right.

Mr. WILSON. I think at this time they will just be offered together, and if further reference is made to them at the time the testimony is taken, we can identify them at that time.

"A" will be the labels on the vanilla sweet chocolate wafers;

"B" will be the labels on the Hershey's sweet milk chocolate;

"C," the fifty-fifty almond bar;

"D," the superior vanilla sweet chocolate;

"E," milk chocolate kisses;

"F," solid chocolate bonbons;

"G" will be the sweet milk chocolate coquettes;

"H," advertising cards of milk chocolate;
"I," sweet milk chocolate almond bars;
"J" will be card for chocolate kisses;
"K," Hershey's almond sweet milk chocolate bars;
77 "L," will be the homestead almond bars;
"M," homestead sweet milk chocolate;
"N," chocolate delights;
"O," card of Hershey's kisses;
"P," placard—Hershey, Pennsylvania.

If your honor please, the proof to be offered by these witnesses will be in a limited field. Under the theory in which the defense is proceeding in these cases we expect to offer proof showing how the products of these companies are purchased from factories, how they are handled through the wholesale confectioners, and from them to the retail confectioners, and from them sold to the customer. That is all the proof that we are going to have. We are contending that these products are candies, and we are going to offer proof to the effect that they are handled in conjunction with other candies, handled as candies and considered as such by the trade and by the consumer.

The COURT. They are sold in candy stores and by candy sellers.

Mr. WILSON. Surely.

Mr. MASON. Of course, the proof as to the physical acts of manufacture and packing and the identity of the individuals to whom sold could not be objectionable at all. We do object, however, to any proof from witnesses in an effort to establish that sweet chocolate and sweet milk chocolate are sold as candy, or with candy, or to persons also buying candy, because, to my mind, that is totally irrelevant to the issue which is here. The issue which is here is whether or not when Congress used the word "candy" that "candy" extended to include a totally different, well-known, and highly defined article, such as sweet chocolate, and that any evidence of the nature outlined by the offer of proof would be merely evidence of persons who would describe facts going to show what has been outlined, and, if shown, would be of no aid to the court, and certainly of no effect as a fact on which to found a judgment of sweet milk chocolate as candy.

The COURT. Are you going to offer evidence to show what the composition of this chocolate is?

78 Mr. WILSON. If the court please, that is a matter entirely within the knowledge of the plaintiff, and the Government has not had the products analyzed. We can say that we know just in a general way, of course, but as to the exact percentages we can not say at this time.

Mr. MASON. Our thought has been and would be, sir, that the varying quality of products would also be immaterial if the Government were to offer it.

The COURT. I merely inquired whether the proof——

Mr. MASON. I am just carrying the thought, until the product is changed and it is no longer just sweet chocolate or sweet milk choco-

late. The Government has admitted that articles taxed and on which the tax was paid, for which these suits have been brought to recover what has been paid, are either sweet chocolate or sweet milk chocolate, and going back to the facts, that are already of record here, we have a well-known article, sweet chocolate, a well-known article, sweet milk chocolate, both of which have received a classification, identification, and definition by the authorized arm of the Government through the Secretary of Agriculture and through Congress itself in its legislative history of the traiff and referred to in the acts going all the way through from the year 1790. Therefore, it is our thought, sir, that such evidence as the Government has indicated it desires to offer from these witnesses would be interesting but not relevant to the issue that is here.

Mr. WILSON. If the court please, counsel's statement made a moment ago to the effect that the Government admits—to the effect, at least, that the products manufactured by these companies were sweet chocolate or sweet milk chocolate is true to this extent: The allegations of the various statements of claims in these cases allege that the plaintiffs during certain periods of time manufactured and sold certain sweet chocolate and sweet milk chocolate in various forms and sizes. Now, a chocolate cream is a form of sweet milk chocolate, if you want to call it that.

Mr. MASON. Oh, no.

79 Mr. WILSON. Of course, we have no evidence here. The plaintiffs have taken upon themselves the assumption of the obligation of any testimony. So far as we know up to the present moment these products were sweet chocolate and sweet milk chocolate in different forms and sizes. That is all we know about it. So when you attempt to talk of sweet chocolate or sweet milk chocolate, as referred to by the Department of Agriculture, where the Department of Agriculture was talking about the purity that a certain product had, so far as the quality was concerned to pass the pure food law, you are talking about an entirely different subject than we are. We are interested in a product that is made up of chocolate, sugar, and flavored in some instances with nuts, a finished product, as distinguished from the raw product, which is ground from the cacao bean. If so, we should not admit that the products here involved are sweet chocolate and sweet milk chocolate, as referred to by the Department of Agriculture, because they are not.

The COURT. Really, the purpose of your offer is as to the form in which they are sold and the places in which they are sold, and so on?

Mr. WILSON. Our theory is that these products as manufactured, since they contain a special percentage of flavor, of nuts and cream, and whatever is put in them, and since they are sold to the candy trade, to the wholesalers, and sold by them to the retailers and the consumers, they are within the meaning of the act of 1921 where the term "candy" is used.

The COURT. On that theory, leaving out any question of the regulations of either of the departments, if some product contained a sugar, nothing but sugar, made up in the exact form, and was sold to the candy dealers, sold as candy, on that theory that could be developed to show it was candy.

Mr. WILSON. I do not understand your statement. I am sorry.

80 The COURT. My thought, following that line and leaving out of consideration all of these regulations—suppose there were no regulations at all and the question was whether sugar came under the head of "candy" at all, just plain candy, and you would offer to prove that ordinary sugar lumps, made up in attractive form, animals or something of that sort, and sold in candy stores, it would be candy within the meaning of that act.

Mr. WILSON. I would say, in answer to your honor, if ordinary squares of sugar, for instance, Domino sugar, were rolled up and fixed up in some attractive package, with labels on them, which would be appropriate to a confection in which sugar was carried, and sold in competition with but also as candy, I would say they were also within the meaning of the act.

(Recess was here taken until 10.15 o'clock a. m.)

81 LOUIS NEWHOFF, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. Where do you reside? Where do you live?
A. 1826 South Broad Street.
Q. In Philadelphia?
A. In Philadelphia.
Q. In what business are you engaged?
A. Confectionery.
Q. Confectionery?
A. Yes.
Q. And where is your place of business?
A. 255 Market Street.

Mr. MASON. Mr. Wilson, do I understand that Mr. Newhoff has been called for all four cases?

Mr. WILSON. For the Hershey case.

By Mr. WILSON:

Q. How long have you been engaged in the confectionery business?
A. About thirty-two years.
Q. And what portion of that time have you been here; all the time?
A. In that section, about seven years.
Q. Seven years?
A. That's where I am located now.
Q. I mean in Philadelphia.
A. In Philadelphia all the time.

Q. Do you handle any of the products manufactured by the Hershey Chocolate Company, of Hershey, Pennsylvania?

A. Yes, sir.

Q. For how long a time have you handled those products?

A. Since I have—well, it would be about the same time, I believe; something about twenty-five or thirty years, between that time, because when I started in business Hershey wasn't in the chocolate business then; just about twenty-five or twenty-seven years, something like that.

Q. What of the Hershey products do your carry?

A. We carry practically the complete line.

82 Q. And what, so far as you can recall now, are the names of some of their products?

A. Well, they are making milk chocolate, making chocolate almond bars, and different other items, but they are all chocolate goods.

Q. They are all chocolate goods?

A. They are all chocolate goods.

Q. You have said that you are in the confectionery business?

A. Yes, sir.

Q. What trade do you supply?

A. We supply the candy stores and drug stores.

Q. Candy and drug stores, generally?

A. Yes; and probably the grocery stores. You know, they are handling the goods.

Q. You supply those lines of business with the Hershey products, do you?

A. I do.

Q. Where do you buy the Hershey products?

A. I get them direct from Hershey.

Q. From the factory?

A. From the factory.

Q. How are those products handled by you?

A. Well, as chocolate.

Q. As chocolate?

A. Right.

Q. Your place is advertised as what?

A. As a confectionery.

Q. You handle that stuff as chocolate confectionery, do you?

A. We handle the confectionery line, but there are different varieties in confectionery, but anybody can come in and ask for the particular item. For instance, if they ask for chocolate, I am going to give them chocolate.

Q. Your line, however, is limited to confectionery of all kinds?

A. Of all kinds.

Q. You supply the confectionery trade?

83 A. Exactly.

Q. Do you know, of your own knowledge, whether wholesale confectioners in this community generally handle Hershey products? Do you know, of your own knowledge, whether they do?

A. Why, naturally. I believe the majority of jobbers in the confectionery line handle Hershey goods. It is a very prominent item.

Q. You know a great many who do?

A. Sure.

Q. And those products are handled by those men in the confectionery department—in the confectionery field?

A. Yes, sir.

Cross-examination by Mr. MASON:

Q. Do you handle nuts of any kind? Do you handle salted nuts?

A. We do.

Q. And do you handle salted peanuts?

A. We do.

Q. Salted almonds?

A. Not exactly. The most we do handle are salted peanuts.

Q. And those are handled in the confectionery trade?

A. Some will handle them, and some will not handle them.

Q. You, yourself, do handle them?

A. I do.

Q. Do you handle dates?

A. No; we do not.

Q. Do you handle stuffed dates of any kind?

A. Sometimes, but not all the time. I don't consider it as an item.

Q. Do you handle prunes of any kind?

A. We do sometimes.

Q. Do you handle candied fruit of any kind?

A. What do you mean by "candied fruit"?

Q. What kind of candied fruit do you handle?

84 A. We would say "candy fills." That would be different kinds of fruit. We do handle them.

Q. Do you handle raisins of any kind?

A. We do.

Q. There is quite a large demand for raisins in the confectionery trade, is there not?

A. Well, it is quite a seller.

Q. And raisins are put up in small boxes, and they are eaten by various people who buy them in the boxes, are they not?

A. Yes, sir.

Q. Do you handle what are called "chocolate-covered crackers"—the various confections that are put out by the bakers?

A. Yes, sir; I do.

Q. Those small cakes——

A. Yes; they are put up in five-cent packages, chocolate coated; yes, sir.

Q. I am wondering if you also handle those various small toys, balloons, nicknacks of that sort?

A. Well, that is no item; just——

Q. Just a side line?

A. Just on the side.

Q. But you sell them to the confectionery trade, do you not?

A. Oh, yes. I don't know who is buying them, whether it is confectioners or retailers.

Q. The small stores?

A. Yes, sir.

By the COURT:

Q. That is, you sell them?

A. We do.

By Mr. MASON:

Q. Mr. Wilson asked you whether the wholesale confectioners handled Hershey's sweet chocolate and sweet milk chocolate.

A. Yes, sir; they do; oh, yes.

Q. The tobacco stores also handle Hershey's products, do they not?

85 A. Yes; they do.

Q. And the wholesale drug jobbers handle Hershey products?

A. Yes; they do.

Q. And the wholesale grocery jobbers handle Hershey products, do they not?

A. Yes, sir.

Q. And what they handle and what you handle are Hershey's sweet chocolate and sweet milk chocolate?

A. Exactly.

Redirect examination by Mr. WILSON:

Q. Your main lines in your store are candies; that is what you mean?

A. Why, the general line.

Q. You are in the candy business, the wholesale business?

A. The wholesale business.

Mr. WILSON. I want to pursue the same line of examination in regard to the Wilbur products.

Mr. MASON. I understand the witness is now being examined in the Wilbur cases. Do you agree, Mr. Wilson, that this testimony will apply to all of the cases?

Mr. WILSON. All right; that will be very agreeable.

Mr. MASON. It is agreed by counsel for the plaintiffs and counsel for the Government that the testimony just given by the witness in relation to the Hershey cases shall apply to the other three plaintiffs, and that it is to be assumed that it would be the same in relation to the sweet chocolate and sweet milk chocolate manufactured and sold

by the other three plaintiffs as it has been in relation to the Hershey sweet cholocate and sweet milk chocolate, and that his cross-examination and his answers therein would be the same.

Mr. WILSON. That is all, Mr. Newhoff.

86 ALBERT SCHNEIDER, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. You reside in Philadelphia?

A. I do.

Q. How long have you lived here?

A. All my life.

Q. In what business are you engaged?

A. I am a foreman for the S. S. Kresge Company, 931 Market Street.

Q. Of the Kresge Company?

A. Yes, sir.

Q. How long have you been with that company?

A. I have been with that company eight years.

Q. I will ask you, approximately, how many stores are there in the United States operated in this same chain of the Kresge Company?

A. Between 450 and 500, and they are scattered.

Q. Throughout the United States, generally?

A. All throughout the United States.

Q. The same method of classifying goods, and carrying goods, and buying and selling is employed in all those stores, is it not?

A. Yes, sir; it is.

Q. The same system prevails? Now, with regard to the particular store with which you are connected here in Philadelphia, does that store carry any products of the Hershey Chocolate Company of Hershey, Pennsylvania?

A. They carry Hershey's almond bars and milk chocolate bars only.

Q. Just those two products?

A. Yes.

Q. How long have they carried them?

A. As far as I can remember, I have always seen them on our counters.

Q. At any rate, for several years?

A. Yes.

Q. In what department are those goods carried?

87 A. In our candy department.

Q. Do you know, of your own knowledge, that they are carried in the candy department here in this store with which you are connected?

A. Yes, sir.

Q. How are those goods carried in the other Kresge stores?

Mr. MASON. If you know?

A. The same way. They have got to be.

By Mr. WILSON:

Q. You know that, of your own knowledge, the candy department in the Kresge stores is a separate and distinct department?

A. Yes, sir.

Q. From what place do you buy the Hershey products?

A. We buy them through the Chocolate Sales Corporation, of Hershey.

Q. Buy them from Hershey?

A. Yes, sir.

Q. And you sell them to the consumer; that is, the retail trade?

A. The retail trade. We sell right to the customer.

Cross-examination by Mr. MASON:

Q. As I understand it, the Kresge stores have what you call a candy counter or department?

A. Yes, sir.

Q. And what do you sell there?

A. We sell candy, cakes, toy novelties; a hundred different things.

Q. Sweet chocolate?

A. Yes; we sell sweet chocolate; chocolate covered.

Q. And do you sell bitter chocolate?

A. Well, we sell a line from Hershey which is called the "Cloverdale" chocolate. It is a block chocolate.

98 By the COURT:

Q. What is the "Cloverdale"? Is that a bitter chocolate?

A. No; that's a sweet milk chocolate, the same as the almond bar; only a large cake without nuts.

By Mr. MASON:

Q. The only difference between the sweet chocolate and the almond bar is that the almond bar has a few almonds in it?

A. Yes, sir; that's it.

Q. Will you tell me whether you sell any other sweet chocolate or sweet milk chocolate than Hershey's?

A. Only Hershey's. We carried Klein's until here recently, and we now carry Hershey's exclusively.

Q. In addition to the candy and the sweet milk chocolate and the cakes that you sell over the candy counter, do you sell chewing gum?

A. Yes, sir.

Q. Do you sell stuffed dates?

A. No; we don't carry those.

Q. Do you sell prunes?

A. No, sir.

Q. Do you sell raisins?

A. In boxes, small boxes.

Q. And those boxes are the small five-cent boxes and the ten-cent boxes that are put up for consumption by the purchaser?

A. Yes, sir.

Q. And after you open up the box you find in it the raisins, and you sell also salted nuts?

A. Yes, sir; peanuts.

Q. Do you sell only salted peanuts, or a mixture of peanuts, or things of that sort, salted nuts?

A. We sell peanuts, two or three different kinds, and almonds and things like that; loose salted.

Q. Where do you sell your fruits? In what part of the store do you sell your fruits? Do you sell those at the candy counter?

A. We don't sell fruits. Fruits come under a separate department if we carry such, see?

89 Q. Do you sell any kind of candied fruits at the candy department?

A. Well, if you want to call the orange slices candied fruit, you could call it.

Q. What would you call it? It is a candy?

A. It is the slices only; just with the orange flavor.

Q. Not the solid orange?

A. No.

Q. At the candy counter do you sell at various seasons for various occasions, the holiday trade and St. Patrick's trade, little favors, which are made up to put on a table to decorate a table?

A. No; that is sold—it comes under the stationery department.

Q. What can you say about the other things that you sell at the candy department, beside the things that you have indicated?

A. Well, there's glass novelties filled with candy and such.

Q. Those are sold empty and otherwise?

A. No; mostly all filled. That glass comes with the candy when it is sold.

Q. That is to say, a glass bird or a glass elephant when it is filled with candy becomes candy in the eyes of your department?

A. That's the way it comes to our stores.

Q. It would be rather unfortunate for the person who ate the filling to try and eat the glass containing the candy, would it not?

A. It sure would.

Q. Did you say you also sold toys at the candy department?

A. That's it. We call them "candy toys." Those are bought through our main office in Detroit, our buyer. We have no jurisdiction over it. We have to take what he sends us.

Q. In addition to the candy toys, do you have the pap'er-maché toys as well?

A. No, sir.

Q. Only the glass toys?

90 A. Yes.

The COURT. Did he sell Klein's some time ago?

Mr. MASON. Yes; as I understand it, he sold it until some time ago.

Mr. WILSON. I think this testimony should apply to the Hershey and the Klein cases.

Mr. MASON. That is agreed to.

91 ISRAEL MARCOLIS, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. You are a resident of Philadelphia?
A. Yes, sir.
Q. Are you in business here?
A. In business in Philadelphia; yes, sir.
Q. And what is the name of your business?
A. We are operating under the name of "Candy Headquarters."
Q. Where is your store?
A. 117 Market Street.
Q. Are you in the wholesale business or retail business, or both?
A. Both.
Q. How long have you been engaged in that business here in Philadelphia?
A. Well, about thirteen or fourteen years.
Q. In Philadelphia?
A. In Philadelphia, in that business.
Q. Does your company carry any of the chocolate products manufactured by the Hershey Company at Hershey, Pennsylvania?
A. Yes, sir.
Q. Can you tell us the names of some of those products?
A. Hershey milk chocolates, Hershey almond bars, Hershey milk chocolate kisses.
Q. Do you carry the bars in different sizes?
A. Five and ten cent and half-pound cakes.
Q. And how long have you carried those products?
A. Ever since I have been selling candy; that's twelve or thirteen years.
Q. And do you sell anything other than candy?
A. Yes, sir.
Q. You do?
A. Yes, sir.

Q. What other things do you sell other than candy?
92 A. We sell tobacco, ice-cream supplies, fountain supplies, and sell novelties.
Q. From whom do you buy your Hershey products?
A. From the Chocolate Sales Corporation, of Hershey, Pa.
Q. You buy direct from the manufacturer?
A. Direct from the manufacturer; yes, sir.
Q. How are those products handled by you—as what?
A. As chocolate; sold as chocolate.
Q. Your tobacco and your subitems that you mentioned a moment ago, do you handle those wholesale, or retail, or both?
A. Wholesale only.
Q. And you handle candy?
A. Yes, sir.

Q. And included in that is chocolate candy?
A. Yes, sir.
Q. Who do you supply?
A. Well, jobbers, cigar stores, drug stores, groceries, stands—outside stands and indoor stands.
Q. Candy stores?
A. Candy stores; yes, sir.
Q. You do not handle any groceries, do you?
A. No, sir.
Q. You say the name of your place is the "Candy Headquarters"?
A. "Candy Headquarters"; yes, sir.
Q. And in addition to candy you handle tobacco and sell other supplies?
A. Yes, sir.

Cross-examination by Mr. MASON:

Q. As I understand it, your business is jobbing various small articles, is it not?
A. Yes, sir.
Q. And you have told us that you handle tobacco goods?
A. Yes, sir.
93 Q. Does that mean cigarettes and chewing tobacco?
A. Cigars, cigarettes, and smoking tobacco.
Q. Do you handle chocolate and raisins?
A. Yes, sir.
Q. That is, sweet chocolate and sweet milk chocolate?
A. Yes, sir.
Q. And you sell chocolate almond bars?
A. Yes, sir.
Q. The almond bars that you handle are the same as the sweet milk chocolate, except they have a few almonds in them?
A. A few almonds in them.
Q. You handle, I think you said, certain small articles for the drug stores?
A. Not drug supplies.
Q. You handle cough drops, do you not?
A. Cough drops; yes, sir.
Q. You handle certain soda supplies?
A. Yes, sir.
Q. You handle mint of various kinds?
A. Yes, sir.
Q. And you handle candies?
A. Yes, sir.
Q. And you handle chewing gum?
A. Yes, sir.
Q. And you handle stuffed dates, do you?
A. Chocolate-coated dates.
Q. And you handle salted nuts of all kinds?
A. Salted nuts; yes, sir.
Q. What kind of small toys do you handle?

A. We handle balloons, we handle rubber balls; like clay pipes, and sell trinkets.

Q. All kinds of trinkets of that sort. As a matter of fact, you might say it would cover all the articles that would be available in the five-and-ten-cent trade, would it not; a large part of it?

A. Penny, five-and-ten-cent trade; yes, sir.

Q. And in the five-and-ten-cent trade you include the raisins that have been spoken of here; that is, the small boxes of raisins?

A. Yes, sir; we handle them.

Q. I wonder do you handle the small cakes, confections of that sort?

A. We handle peanut-butter sandwiches, cheese sandwiches, fig sandwiches, in five-cent packages.

Q. Do you handle these small cakes that are covered with chocolate?

A. Yes, sir; we handle those.

Q. All things of that kind?

A. Yes, sir.

By the COURT:

Q. Eskimo pie?

A. Eskimo pie; no, sir; that's not chocolate, that's ice cream.

Redirect examination by Mr. WILSON:

Q. In your store, the candies, the greater part are on the shelves, against the wall, in boxes of different kinds, or where do you keep them?

A. On the shelves.

Q. The Hershey stuff and all the other candies belong on the same shelf, together?

A. Together.

Recross examination by Mr. MASON:

Q. Wait just a minute, because Mr. Wilson is testifying. As I understand it, you have your various goods divided up into departments, so that you will know what you have got in stock, have you not? You do not have them——

A. Pardon me, do you want me to explain?

Q. Yes.

A. I wouldn't place a box of cigars with a box of chocolate in the one bin.

Q. Certainly not.

A. But it is only one store.

Q. But what you do is to separate, in a general way, the various articles that you have there, so that you will know what you have there?

A. Yes.

Q. And in one place you keep your sweet chocolate and your sweet milk chocolate, and in another place you keep your raisins, and in

another place you keep your tobacco, and in another place you keep your hard candies and your various kinds of candies?

A. Sure.

Q. That is all separated in a proper way?

A. So we will know where to lay our hands on it.

Q. Do you handle Klein's?

A. Klein's chocolate; yes, sir.

Q. Do you handle the York chocolate?

A. No, sir; we don't handle it one time.

Q. You did handle it at one time?

A. As far as I can remember, I don't think we did.

Mr. MASON. Then it is agreed that the testimony of Mr. Margolis will be taken to apply to the Wilbur cases and the Klein cases with the same force and effect as it applies to the Hershey cases.

96 Mr. WILSON. If the court please, that is all the testimony from the defense at this time.

I neglected at the time the Hershey exhibits were introduced to offer in evidence the similar advertising and wrappers of the Wilbur Company, which we would like to offer in evidence at this time. There being no objection to the offer, the offer is as follows; these are the exhibits in the Wilbur cases:

"1-W" will be container for Wilbur's sweet milk chocolate pats;

"2-W" will be advertising card for Wilbur Buds;

"3-W," the same, advertising card for Wilbur Buds;

"4-W" is the same; advertising card for Wilbur Buds;

"5-W" and "6-W" and "7-W" will come under the same classification; cards or advertising slips of Wilbur Buds;

"8-W" will be the same;

"9-W" and "10-W" are advertising sheets of Buds.

The defendant rests, your honor.

Mr. MASON. If your honor please, the plaintiffs will also rest, so that the record is now complete for your honor.

(Argument set for Thursday, June 7, 1928, at 10.00 o'clock a. m., daylight saving time.)

And thereafter counsel for the plaintiff and counsel for the defendant, respectively, made requests of the said court for findings of fact and conclusions of law, which requests for findings of fact and conclusions of law, respectively, were as follows:

97 PLAINTIFF'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Title omitted.]

Findings of fact

The plaintiff, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:

1. The plaintiff at all the times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, is a citizen and resident of the State of Pennsylvania, having its principal place of business at Hershey, in the county of Dauphin, in the middle district of Pennsylvania, and is and was at the times herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all the times hereinafter mentioned was the United States collector of internal revenue for the first district of Pennsylvania, in which district the plaintiff's principal place of business, as aforesaid, was located at all the times hereinafter mentioned; the defendant maintained an office for the transaction of business in the city of Philadelphia, and is a citizen and resident of the city of Philadelphia, in the Eastern District of Pennsylvania.

3. During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers certain
98 sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of nine million one hundred and fourteen thousand three hundred and forty-five $\frac{47}{100}$ dollars ($9,114,345.47), and during the period from January 1, 1922, to December 31, 1923, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of thirty-five million two hundred and forty-one thousand seven hundred and two $\frac{71}{100}$ dollars ($35,241,702.71), making the total selling price of sales during the period from June 1, 1921, to December 31, 1923, both dates inclusive, the sum of forty-four million three hundred and fifty-six thousand and forty-eight $\frac{18}{100}$ dollars ($44,356,048.18).

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), and under and by virtue of the authority of the revenue act of 1921, Title IX, section 900 (subdivision 6), did for the period aforesaid assess excise taxes against the plaintiff on the amount of the said sales hereinbefore stated aggregating one million five hundred and twelve thousand four hundred and sixty $\frac{68}{100}$ dollars ($1,512,460.68).

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, a tax of one million five hundred and twelve thousand four hundred and sixty $\frac{68}{100}$ dollars ($1,512,460.68), being five per centum (5%) of the amount of said sales for the months of June, July, August, September, October, November, and

December, in the year 1921, to wit, the sum of $455,717.28, and being three per centum (3%) of the amount of said sales for the whole of each of the years 1922 and 1923, to wit, the sum of $1,057,251.06, less than the sum of five hundred and seven $\frac{66}{100}$ dollars ($507.66) deducted therefrom for overpayments made, as follows:

Date of payment	Month for which paid	Amount paid	Date of payment	Month for which paid	Amount paid
July 30, 1921	June 1921	$36,420.90	November 28, 1922	October, 1922	$46,570.54
August 29, 1921	July, 1921	32,861.47	December 29, 1922	November, 1922	24,491.90
September 29, 1921	August, 1921	88,824.10	January 29, 1923	December, 1922	30,127.28
October 29, 1921	September, 1921	95,215.97	February 28, 1923	January, 1923	45,177.83
November 29, 1921	October, 1921	89,580.57	March 30, 1923	February, 1923	40,160.62
December 28, 1921	November, 1921	55,699.69	April 30, 1923	March, 1923	35,575.37
January 28, 1922	December, 1921	40,104.56	May 29, 1923	April, 1923	46,096.39
February 27, 1922	January, 1922	33,418.51	June 30, 1923	May, 1923	49,745.57
March 28, 1923	February, 1922	30,849.74	July 31, 1923	June, 1923	34,285.27
April 29, 1922	March, 1922	36,160.45	August 30, 1923	July, 1923	30,556.62
May 29, 1922	April, 1922	26,884.72	September 29, 1923	August, 1923	36,744.28
June 30, 1923	May, 1922	36,234.06	October 29, 1923	September, 1923	76,483.43
July 28, 1922	June, 1922	25,502.23	November 28, 1923	October, 1923	69,957.46
August 29, 1922	July, 1922	30,645.70	December 28, 1923	November, 1923	52,765.69
September 29, 1922	August, 1923	43,107.04	January 30, 1924	December, 1923	37,204.94
October 28, 1922	September, 1922	58,491.84			
					1,812,460.66

6. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists of the United States and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

7. The definitions and standards of purity for food products, including cacao products, established and officially promulgated by the Secretary of the Department of Agriculture of the United States, are set forth in a Circular No. 10, dated, viz, November 20, 1903; in Circular No. 13, dated December 20, 1904, superseding Circular No. 10; Supplementary Circular No. 17, dated March 8, 1906; and Circular No. 19, dated June 26, 1906, superseding Circulars Nos. 13 and 17, in all of which circulars sweet chocolate, including therein sweet-milk chocolate, was defined as the solid or plastic mass obtained by grinding cocoa nibs without removal of fat or other constituents, except the germ, mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. The definitions and standards in force as of May 14, 1919, continued in force during the period when the sales heretofore referred to were made by the plaintiff, set forth in Circular No. 136 of the United

States Department of Agriculture, dated May 14, 1919, superseding but in continuation of the earlier circulars Nos. 10, 13, 17; and 19, on the same subject, to the same effect, contained the following:

101 (Circular No. 136, page 18)

"E. TEA, COFFEE, AND CACAO PRODUCTS

"C. CACAO PRODUCTS"

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constitutents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty-hundredths per cent (3.50%) of crude fibre, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fibre, or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

102 "8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened coca, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

"10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber, or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

8. The said definitions and standards of purity for food products promulgated and published by the Secretary of the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under which classification is included "candy," and the said defini-

tions and standards do not classify sweet chocolate and sweet milk chocolate under the sub-classification therein contained of "c. Candy," which is therein defined as "a product made from a saccharine substance or substances."

9. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products, including cacao products, for the United States of America, and the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in
103 him heretofore referred to are legal standards of purity, classification, and definitions of food products for the United States of America.

10. The plaintiff, in accordance with the provisions of law and the acts of Congress in that regard and the regulations of the Secretary of the Treasury thereto appertaining, on or about April 16, 1923, September 17, 1923, and March 12, 1924, respectively, viz, on April 16, 1923, for the payments made for the month of June, 1921, to and including the month of December, 1922, and on September 17, 1923, for the payments made for the month of January, 1923, to and including the month of July, 1923, and on March 12, 1924, for the payments made for the month of August, 1923, to and including the month of December, 1923, duly filed in the office of the collector of internal revenue at Lancaster, Pennsylvania, for transmission to the Commissioner of Internal Revenue, its claims for refund for payment to it of the amounts of the said taxes, paid as aforesaid, erroneously, wrongfully, and illegally collected. The said claims for refund were transmitted to the Commissioner of Internal Revenue and identified by him by the numbers Nos. 301063, 301064, 301065, 301069 to 301076, both inclusive, 301079 to 301082, both inclusive, 301086, 301092, 301093, 301094, 314997 to 315003, both inclusive, 328744, 328745, 328747, 328748, and 328749. On or about January 23, 1926, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the said claims for refund of one million five hundred twelve thousand four hundred and sixty 68–100 dollars ($1,512,460.68) were rejected.

11. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

12. Sweet chocolate and sweet milk chocolate, on February
104 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

13. Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

14. Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the

germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product.

15. Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug.

16. Since the act of May 2, 1792 (1 Stat. L. 250, 2nd Congress, session 1, chapter 27), Congress has classified chocolate for revenue purposes as an article distinct and separate from candy.

17. Sweet chocolate and sweet milk chocolate are not candy.

Conclusions of law

The plaintiff requests the court to make the following conclusions of law:

1. The revenue act of 1918 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

105 2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921.

4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant.

5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Plaintiff.

106 DEFENDANT'S REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Title omitted.]

Findings of fact

The defendant, considering the facts hereinafter set forth to be proven, requests the court to find the same as follows:

I

The plaintiff at all the times hereinafter mentioned was and still is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, is a citizen and resident of the State

of Pennsylvania, having its principal place of business at Hershey, in the county of Dauphin, in the Middle District of Pennsylvania, and is and was at the times herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

II

The defendant at all the times hereinafter mentioned was the United States collector of internal revenue for the first district of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located at all the times hereinafter men-
107 tioned; the defendant maintained an office for the transaction of business in the city of Philadelphia, and is a citizen and resident of the city of Philadelphia, in the Eastern District of Pennsylvania.

III

During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of nine million one hundred and fourteen thousand three hundred and forty-five 47/100 dollars ($9,114,345.47), and during the period from January 1, 1922, to December 31, 1923, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of thirty-five million two hundred and forty-one thousand seven hundred and two 71/100 dollars ($35,241,702.71), making the total selling price of sales during the period from June 1, 1921, to December 31, 1923, both dates inclusive, the sum of forty-four million three hundred and fifty-six thousand and forty-eight 18/100 dollars ($44,356,048.18).

IV

The defendant above named, acting under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), and under and by virtue of the authority of the revenue act of 1921, Tile IX, section 900 (subdivision 6), did, for the period aforesaid, collect excise taxes from the plaintiff on the amount of the said sales hereinbefore stated aggregating one million five hundred and twelve thousand four hundred and sixty 68/100 dollars ($1,512,460.68).

V

The plaintiff, in accordance with the provisions of law and the acts of Congress in that regard and the regulations of the Secretary
108 of the Treasury thereto appertaining, duly filed its claims for refund for payment to it of the amounts of the said taxes, collected as aforesaid. Subsequently said claims were officially rejected by the Commissioner of Internal Revenue.

VI

The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

Conclusions of law

The defendant requests the court to make the following conclusions of law:

I

The sweet chocolate and the sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

II

The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

III

The defendant is entitled to judgment.

GEORGE W. COLES,
United States Attorney,
Attorney for Defendant.

And thereafter, to wit, on November 22, 1928, the said court filed an opinion embodying findings of fact and conclusions of law which follows (in the form revised by the court as indicated by the opinion of January 17, 1929), viz:

109 In United States District Court, Eastern District of Pennsylvania

June term, 1926. No. 12360

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Opinion of the court

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918, and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits

involve the general question whether certain sweet-chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected as typical for an opinion.

The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(2) Candy, 5 per centum."

110 The corresponding section of the revenue act of 1921 is exactly the same, except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918 sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "Solid Chocolate Bon Bons," "Chocolate Kisses," "Chocolate Delights," "Sweet Milk Chocolate Pats," "Chocolate Cigarettes," "Croquettes," "Buds," "Wafers," "Almond Bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy—that is, eaten in small quantities from the hand as a sweetmeat.

111 The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 8, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word "candy" to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under the act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and
112 urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual Members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that ordinarily the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question." (Andrews v. Hovey, 124 U. S. 694, 716.) This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting

for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. (U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 252 U. S. 78, 90.)

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one, coming very close to being compelling, and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes mostly tariff acts, but including several revenue acts, enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between
113 chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred in separate provisions to "sugar candy," "all confectionery not specially provided for in this section," and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery," and "chocolate." In the war revenue act of 1866 they are "sugar candy," all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence (13 Howard 274), in which case the Supreme Court said: "* * * For when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe (13 Wallace 162), and other cases.

These decisions announce a well-established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. (See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 182 U. S. 455.)

Concluding, therefore, that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved can not be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." (Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485.) A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." (Endlich's Interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.)

Certainly the word candy has never acquired a technical or scientific definition, and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use, and, taken, in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the

court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; In re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F–80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal, 404), and varying conclusions have been reached.

Curiously enough, both parties insist that the meaning of
116 the term is clear and unambiguous (and therefore not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker & Company (281 Fed. 41) (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word
117 chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word

in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said: "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define, and include as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy
118 which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these, there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression, I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case, and, while the opinion does not indicate it,

it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

(Filed November 22, 1928.)

Simultaneously with the filing of the foregoing opinion and findings and conclusions the said court filed special findings and conclusions on the requests for findings of fact and conclusions of law as follows, viz:

119 *Findings of fact*

[Title omitted.]

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

Conclusions of law

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the court:

W. H. KIRKPATRICK, *J.*

120 Upon motion of counsel for plaintiff the court thereafter ordered a reargument of the questions involved, which was had on December 4, 1928, and thereafter, on January 17, 1929, the court filed the following opinion modifying and reaffirming the findings and conclusions heretofore made, viz:

In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Opinion sur reargument

Filed January 17, 1929

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above-entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court, in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company, stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending," in line 8, on page 5, will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement, and it will be eliminated.

121 The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

II

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases:

"In addition thereto the statements of facts contained in the the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are, first, that the above manner of finding facts is not proper practice, and, second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases, but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge, and I am unable to see any compensating advantage, either in simplicity of method or in accuracy, in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of proper practice in stating the
122 fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States, handed down November 19, 1928, or one day before the opinion in this case was filed, and, of course, not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say: "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect
123 of the opinion in that case to abrogate the well-established rule that where a word is not a technical word but one of general popular usage, with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all. The act there under consideration was a special act allowing a suit in admiralty to be brought in the district court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one, involving legal terms and legal procedure, and in its interpretation the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy," however, we have just the opposite situation. Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co., #94, October term, 1928) the general rule referred to is reaffirmed. The court said: "Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression, or absurdity (United States v. Goldenberg, 168 U. S. 95, 103), or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in other acts of Congress. That matter was considered fully, and the
124 question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the latter considerations were the more important and controlling ones.

The conclusions reached in the opinion filed will not be changed.

By the court:

W. H. KIRKPATRICK, *J.*

And thereupon counsel for the said plaintiff did then and there except as set forth in the notes of the trial before the said court

without a jury and did then and there except to the findings of fact and conclusions of law made by the said court, as follows, viz:

Plaintiff's exceptions

A. Exceptions to the findings in the opinions of the court.

1. The plaintiff excepts to the following finding in the revised opinion of the court:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The plaintiff excepts to the following finding in the revised opinion of the court:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning
125 of a word used in a revenue statute passed nearly twenty years later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The plaintiff excepts to the following finding in the revised opinion of the court:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The plaintiff excepts to the following finding in the revised opinion of the court:

"Certainly the word candy has never acquired a technical or scientific definition, and in fact there are few words in the language less likely to be scientifically defined."

5. The plaintiff excepts to the following finding in the revised opinion of the court:

"It is a word of everyday household use, and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The plaintiff excepts to the following finding in the revised opinion of the court:

"When we examine the revenue acts of 1918 and 1921, it becomes
126 perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The plaintiff excepts to the following finding in the revised opinion of the court:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The plaintiff excepts to the following finding in the revised opinion of the court:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The plaintiff excepts to the following finding in the revised opinion of the court:

"But the subject of this inquiry is a general term, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold."

10. The plaintiff excepts to the following finding in the revised opinion of the court:

"To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose 127 in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The plaintiff excepts to the following finding in the revised opinion of the court:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy."

12. The plaintiff excepts to the following finding in the revised opinion of the court:

"In view of what has been said the decision is reached that the collection of the tax was lawful."

13. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States,

No. 15, Oct. T., 1928, U. S. Supreme Court) to abrogate the well-established rule that where a word is not a technical word but one of general popular usage, with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

128 14. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15, Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

B. Exceptions to the denial of plaintiff's requests for findings of fact.

1. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

2. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

3. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

129 "Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished products."

4. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

5. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792 (1 Stat. L. 259, 2nd Congress, session 1, chapter 27), Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

6. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

C. Exceptions to the denial of the plaintiff's requests for conclusions of law.

1. The plaintiff excepts to the refusal of the court to affirm the plaintiff's first request for conclusion of law:

180 "1. The revenue act of 1918 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine,"

which was denied by the court.

2. The plaintiff excepts to the refusal of the court to affirm the plaintiff's second request for conclusion of law:

"2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine,"

which was denied by the court.

3. The plaintiff excepts to the refusal of the court to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921,"

which was denied by the court.

4. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant,"

which was denied by the court.

5. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest,"

which was denied by the court.

181 D. Exceptions to the court's conclusion of law.

1. The plaintiff excepts to the court's conclusion of law as follows:

"1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid are candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

2. The plaintiff excepts to the court's conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

3. The plaintiff excepts to the court's conclusion of law as follows:

"3. The defendant is entitled to judgment."

And inasmuch as the said testimony, opinions, findings, and conclusions so excepted to do not fully appear upon the record, the said counsel for the plaintiff did then and there tender this bill of exceptions as aforesaid and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge, at the request of the said counsel for the plaintiff, did put his [illegible] to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 26 day of January, 1929.

W. H. KIRKPATRICK, *J.* [L. S.]

PHILADELPHIA, PA., *January 26th, 1929.*

132 I hereby approve the above bill of exceptions as to form and agree that the same may be settled by the court, and I hereby accept service of notice of settlement thereof in accordance with the ruling of the court.

GEORGE W. COLES,
United States Attorney for Defendant.

133 In United States District Court

[Title omitted.]

Precipe to enter judgment

Filed April 22, 1929

To the CLERK, U. S. D. C., E. D. of Pa.

Enter judgment in the above-entitled case in favor of the defendant and against the plaintiff in accordance with the revised opinion of the court filed January 23, 1929.

GEORGE W. COLES,
United States Attorney.

134 In United States District Court, Eastern District of Pennsylvania

June term, 1926. No. 12960

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE

Judgment

Filed April 22, 1929

Before KIRKPATRICK, J.

And now, April 22nd, 1929, in accordance with the revised opinion of the court filed on January 23rd, 1929, and by precipe filed, judg-

ment in the above-entitled case is hereby entered in favor of the defendant and against the plaintiff, Hershey Chocolate Company.

By the court:

Attest:

E. G. JOHNSON,
Deputy Clerk.

125 In United States District Court

Assignments of error

Filed May 17, 1929

[Title omitted.]

Comes now the above-named plaintiff, the appellant herein, by its attorneys of record, and assigns as errors upon which it will rely the following errors as having intervened in the record, proceedings, and judgment of the United States District Court for the Eastern District of Pennsylvania in the above-entitled cause, to wit:

1. The learned court below erred in the following finding in the revised opinion:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The learned court below erred in the following finding in the revised opinion:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the
126 meaning of a word used in a revenue statute passed nearly twenty years later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The learned court below erred in the following finding in the revised opinion:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The learned court below erred in the following finding in the revised opinion:

"Certainly the word "candy" has never acquired a technical or scientific definition, and, in fact, there are few words in the language less likely to be scientifically defined."

5. The learned court below erred in the following finding in the revised opinion:

"It is a word of everyday household use, and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The learned court below erred in the following finding in the revised opinion:

"When we examine the revenue acts of 1918 and 1921 it
137 becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The learned court below erred in the following finding in the revised opinion:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The learned court below erred in the following finding in the revised opinion:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The learned court below erred in the following finding in the revised opinion:

"But the subject of this inquiry is a general term, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold."

10. The learned court below erred in the following finding in the revised opinion:

"To sum up the whole problem, we have here on the one
138 hand a pretty well defined popular usage of the term candy, which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The learned court below erred in the following finding in the revised opinion:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit, passing upon the same question under the act of 1918, decided that sweet chocolate was properly taxable as candy."

12. The learned court below erred in the following finding in the revised opinion:

"In view of what has been said, the decision is reached that the collection of the tax was lawful.

13. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15, Oct. T., 1928, U. S. Supreme Court) to abrogate the well-established rule that where a word is not a technical word but one of general popular usage, with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the 139 most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

14. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15, Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

15. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

16. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

17. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

140 "Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents

except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet-milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole-milk solids in the finished product."

18. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

19. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792 (1 Stat. L. 259, 2nd Congress, session 1, chapter 27), Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

20. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

21. The learned court below erred in refusing to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

141 22. The learned court below erred in refusing to affirm the plaintiff's second request for conclusion of law:

"2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

23. The learned court below erred in refusing to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

24. The learned court below erred in refusing to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

25. The learned court below erred in refusing to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest."

26. The learned court below erred in its conclusion of law as follows:

"1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action

were paid are candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

27. The learned court below erred in it conclusion of law as follows:

142 "2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

28. The learned court below erred in its conclusion of law as follows:

"3. The defendant is entitled to judgment."

29. The learned court below erred in entering judgment against the plaintiff and in favor of the defendant.

Wherefore appellant prays that the judgment entered in said cause in the said District Court for the Eastern District of Pennsylvania may be reversed and the said cause remanded.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Plaintiff.

143 In United States District Court

[Title omitted.]

Petition for appeal

Filed May 17, 1929

To the Honorable W. H. KIRKPATRICK, DISTRICT JUDGE:

The above-named plaintiff, Hershey Chocolate Company, feeling aggrieved by the judgment rendered and entered in the above-entitled cause on the 22nd day of April, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignments of error filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings, and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it to perfect its appeal be made.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

HERSHEY CHOCOLATE COMPANY,
By F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Plaintiff.

144 In United States District Court

[Title omitted.]

Order allowing appeal

Filed May 17, 1929

Before KIRKPATRICK, J.

Upon the petition of the plaintiff herein and plaintiff's assignments of error, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment heretofore filed and entered in this cause on the 22nd day of April, 1929, be, and the same is hereby, allowed, and that a certified transcript of the record in accordance with the rules of practice of the courts of the United States be transferred to the said United States Circuit Court of Appeals for the Third Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250, the same to act as a bond for costs on appeal.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

By the court:

Attest:

GEORGE BRODERICK, *Clerk.*

145 In United States District Court

Filed May 17, 1929

[Title omitted.]

Præcipe for transcript of record

To the CLERK OF THE SAID COURT:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals for the Third Circuit pursuant to an appeal filed in the above-entitled case and to include in such transcript the following:

Docket entries;
Statement of claim;
Affidavit of defense;
Stipulation to try case before court without jury;
Opinion, Kirkpatrick, *J.*, filed November 22, 1928;
Findings of fact and conclusions of law;
Opinion, Kirkpatrick, *J.*, filed January 17, 1929;
Revised opinion, Kirkpatrick, *J.*, filed January 22, 1929;
Bill of exceptions;
Præcipe for judgment;
Judgment;
Petition for appeal, and assignments of error;

Order allowing appeal;
Præcipe for transcript of record;
Physical exhibits;
Clerk's certificate.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Plaintiff.

146 *Clerk's certificate*

[Clerk's certificate to foregoing transcript omitted in printing.]

147 In United States Circuit Court of Appeals for the Third Circuit

Nos. 4157, 4158, 4159, 4160, 4161, 4162.
[Titles omitted.]

Order assigning judge

And now, to wit, this 15th day of November, A. D. 1929, it is ordered that Hon. John Boyd Avis, district judge for the District of New Jersey, be, and he is hereby, assigned to sit in above cases in order to make a full court.

(Sgd.) JOSEPH BUFFINGTON,
Circuit Judge.

148 [Minute entry of argument and submission, Nov. 15, 1929, omitted in printing.]

149 In United States Circuit Court of Appeals for the Third Circuit

No. 4157. October term, 1929. Hershey Chocolate Co., appellant, v. B. D. McCaughn, Collector, appellee.
No. 4158. October term, 1929. Hershey Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee.
No. 4159. October term, 1929. Hershey Chocolate Co., appellant, v. Est. B. F. Davis, Collector, appellee.
No. 4160. October term, 1929. Hershey Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee.
No. 4161. October term, 1929. Hershey Chocolate Co., appellant, v. B. D. McCaughn, Collector, appellee.
No. 4162. October term, 1929. Hershey Chocolate Co., appellant, v. Est. B. F. Davis, Collector, appellee.
No. 4163. October term, 1929. Klein Chocolate Co., appellant, v. Est. B. F. Davis, Collector, appellee.
No. 4164. October term, 1929. Klein Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee.

No. 4165. October term, 1929. Klein Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee.

No. 4166. October term, 1929. Klein Chocolate Co., appellant, v. B. D. McCaughn, Collector, appellee.

150 No. 4167. October term, 1929. Wilbur-Suchard Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee.

No. 4168. October term, 1929. Wilbur-Suchard Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee.

No. 4169. October term, 1929. Wilbur-Suchard Chocolate Co., appellant, v. B. D. McCaughn, Collector, appellee.

No. 4170. October term, 1929. York Chocolate Co., appellant, v. Est. B. F. Davis, Collector, appellee.

No. 4171. October term, 1929. York Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee.

151 No. 4172. October term, 1929. York Chocolate Co., appellant, v. B. D. McCaughn, Collector, appellee.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Before WOOLLEY and DAVIS, Circuit Judges, and AVIS, District Judge

Opinion filed June 6, 1930

AVIS, District Judge:

These cases were all tried in the District Court at one time; one opinion was rendered in all of the cases, and although brought into this court by separate appeals, were heard in one argument.

Appellants are all manufacturers of sweet chocolate and sweet milk chocolate, the product of the cacao bean, and made certain payments of amounts alleged to be due the Government as taxes, under the revenue acts of 1918 and 1921 and the regulations of the Internal Revenue Commissioner. All of said payments were made "under protest," and later, at different and sundry times, appellants filed claims for refund with the collectors of internal revenue, in the various districts in which payments had been made, for transmission to the Commissioner of Internal Revenue. All of said claims for refund were rejected by the commissioner, and the suits followed.

The district court, sitting without a jury, heard the testimony, held that the tax was lawfully imposed, and caused judgment 152 to be entered in favor of the defendants, and from these judgments all of the cases are brought by appeal to this court.

Twenty-nine assignments of error were filed and relied upon by the appellants, but as a matter of fact they are all merged in one question to be decided, i. e., Does the word "candy" in the revenue act of 1918 (Title IX, sec. 900 (9), and the revenue act of 1921 (Title IX, sec. 900 (6)) include sweet chocolate and/or sweet milk chocolate?

The portion of the act of 1918 under which the tax was assessed and paid reads as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased—

* * * * * * *

"(9) Candy, 5 per centum; * * *" (40 Stat., c. 18, pp. 1057, 1122.)

The act of 1921 reads exactly the same, with the exception that the percentage of tax is placed at 3 per cent instead of 5.

The decision of this question rests upon—

(1) The definition of the word "candy."

(2) Whether or not sweet chocolate and sweet milk chocolate is candy in accordance with its commonly accepted use.

(3) Did Congress intend to include sweet chocolate and sweet milk chocolate under the term "candy" in the revenue acts?

(4) Was the regulation of the Commissioner of Internal Revenue conclusive, and did he have authority, under the acts, to include sweet chocolate and sweet milk chocolate under the term "candy"?

(5) Do the classifications promulgated by the Secretary of
153 Agriculture, under the pure food laws, in any way affect the question of the legality of the tax imposed?

Under the evidence in this case it is rather difficult to define the word "candy." There is nothing in the testimony outside of the technical definitions and possibly the classifications promulgated by the Secretary of Agriculture to assist the court in arriving at a conclusion as to the inclusiveness of the word. Webster defines candy as follows:

"A more or less solid preparation made by boiling sugar or molasses to the desired consistency and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruit, nuts, etc. Also any sweetmeat made of or coated with a preparation of sugar or molasses; a piece of confectionery."

The evolution of the use of sweetmeats in modern times may have, and probably has, extended the meaning of the word to other articles than those strictly included in the definition given by Webster.

Counsel for appellants argue that the classification by the Secretary of Agriculture, under the pure food laws and under authority given by Congress, indicates that sweet chocolate and sweet milk chocolate are not included within the designation of "candy."

It is true that in this classification candy and chocolate, both "sweet" and "sweet milk," are under separate heads, and it is apparent that for purposes of the statute under which this classification was made it was undoubtedly treated under separate headings, but this may not be conclusive in construing the revenue acts under which this suit was brought. Whether or not "candy" in its technical sense includes sweet chocolate and/or sweet milk chocolate we

do not deem it necessary to decide, in view of our conclusions,
154 hereinafter set forth, with relation to the intention of Congress when the revenue acts of 1918 and 1921 were enacted.

The court below said with relation to the word "candy" as it applies to sweet chocolate and sweet milk chocolate:

"It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact. It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion. While some people might look upon it as candy, we feel that many would call it a food, and in the absence of anything in the record tending to show that this is the popular opinion we can not sustain the judgment of the court on this theory.

We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.

In all of the tariff and internal revenue acts of Congress from 1792 to 1918, candy, generally called "sugar candy," and chocolate and other products of the cacao bean were separately classified.
Chocolate has always, in the various acts, been referred to and
155 taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate, and, when it was asserted that chocolate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the Members of Congress.

The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in congressional enactments or by executive regulation, included in the term "candy," is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate so nomine, notwithstanding the fact that the regulations of the commissioner, classifying both as "candy," under the 1918 act, and that the District Court decision in Massachusetts holding they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of De Forest et al. v. Lawrence (54 U. S. 273, 281) said:

"And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the de-
156 nomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the customhouse.

"It is but fair to presume, after having been treated by the lawmakers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different."

In Reiche v. Smythe (80 U. S. 162, 165) it was held:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in pari materia, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."

The effect of the distinction recognized by Congress is very
157 aptly referred to in the case of Arthur v. Stephani (96 U. S. 125, 127, 128), wherein the court, among other things, said:

"Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name.

* * * * * * *

"Contemporaneously and side by side, all the way down, the statutes provide for different rates of duty on the varieties of sugar and on confectionery, as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties.

* * * * * * *

"It is quite evident that Congress has at all times intended to preserve the distinction between these articles, and that the circuit judge decided correctly when he held that chocolate, although in the form and of the character described, was not dutiable as 'confectionery' under the act of 1864."

This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case sub judice.

This is further demonstrated by an examination of the record of deliberations and discussions in the committees, and also upon the floor of the Senate, when the 1921 act was under consideration, which are corroborative of the facts upon which our conclusions are based.

An examination of the evidence offered in this regard discloses that a Mr. Fuller, apparently a candy manufacturer, called the attention of the Senate committee to a decision in the United States Court, District of Massachusetts, holding that chocolate was not candy and not taxable under the 1918 act; and that some pro-
153 vision should be made in the 1921 act to put chocolate upon the same basis as candy, either by removing the tax from candy, or, inferentially, to impose a similar tax on chocolate. Similar representations were made to the House Ways and Means Committee; and the question was discussed quite fully on the floor of the Senate, the understanding, apparently at that time, being that the word "candy" in the revenue act of 1918 did not include sweet chocolate or sweet milk chocolate.

In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the committee a definition of the word "candy," which included sweet chocolate and sweet milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases.

The deliberations of the committees and the facts produced before them when considering the bill appear to be legal evidence and should be given its due weight. (Holy Trinity Church v. United States, 143 U. S. 457, 464; Binns v. United States, 194 U. S. 486, 495.)

In spite of the knowledge of the Representatives and Senators in Congress, no definite tax was levied on sweet chocolate or sweet milk chocolate; and from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the revenue acts of 1918 or 1921.

159 In both the revenue acts of 1918 and 1921 the authority of the commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:

"That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

It will be noted in this statute that it provides for "rules and regulations" which shall be "for the enforcement of the provisions of this act."

The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly the commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

In the case of Morrill v. Jones (106 U. S. 466, 467) Chief Justice Waite said:

"The Secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

(See also United States v. United Verde Copper Co., 196 U. S. 207.)

A regulation of an executive department construing a statute is given great weight and is strongly persuasive and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. (See Burk-Waggoner Oil Assn. v. Hopkins (N. D. Tex.), 296 F. 492, and cases cited.)

Taking into consideration the reading of the statute, the prior attitude of Congress with relation to imposition of taxes on chocolate, and the fact that the matter was considered and discussed

160 in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining "candy," afterward promulgated by the commissioner and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate in the manner or to the extent contended for by the defendant-appellee.

We therefore hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the commissioner, approved by the Secretary.

It is contended by the appellants that the classifications of the Secretary of Agriculture, promulgated under the pure food laws, conclusively define chocolate as a product which could not be included under the term "candy," which is also classified in these regulations. These classifications were made under laws relating to pure foods, and while they might have some effect upon the establishment of the general definition of the respective products we can not see that they are in any way controlling on the main questions at issue in these cases.

The case of Malley v. Walter Baker & Co. (C. C. A. 1, 281 F. 41) is strongly relied upon by the appellee, it being the contention that this case is controlling as establishing a precedent which in effect should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley case there was no decision upon the question of what Congress intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress, or the proceedings of the committees of Congress in consideration of the bills, was submitted to the court considering that case. We are not able
161 to follow that court in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word "candy," or in its conclusion that the commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress.

The judgments of the District Court are reversed and the cases remanded for new trials or other lawful proceedings in conformity with this opinion.

A true copy:

Teste:

_____ _____,

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

162 In United States Circuit Court of Appeals for the Third Circuit

No. 4157 (List No. 107). October term, 1929

HERSHEY CHOCOLATE CO., APPELLANT

vs.

B. D. McCAUGHN, COLLECTOR, APPELLEE

Judgment, June 6, 1930

In error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said district court in this cause be, and the same is hereby, reversed, and the case remanded to the said District Court for further proceedings in conformity with the opinion of this court.

Philadelphia, June 6, 1930.

(Sd.) VICTOR B. WOOLLEY,
Circuit Judge.

Similar orders entered June 6, 1930, in the following cases:

Hershey Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee, No. 4158.

Hershey Chocolate Co., appellant, v. Est. B. F. Davis, Collector, appellee, No. 4159.

Hershey Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee, No. 4160.

Hershey Chocolate Co., appellant, v. B. D. McCaughn, Collector, appellee, No. 4161.

Hershey Chocolate Co., appellant, v. Est. B. F. Davis, Collector, appellee, No. 4162.

163 [Clerk's certificate to foregoing transcript omitted in printing.]

164 In United States Circuit Court of Appeals for the Third Circuit

No. 4158. October term, 1929

HERSHEY CHOCOLATE COMPANY, APPELLANT

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY UNITED States Internal Revenue Collector for the First District of Pennsylvania, deceased, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4157, and that judgment appropriate to the amount involved in this case

shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, appellee, U. S. C. C. A. Third Circuit, October term, 1929, No. 4157.

Dated June 17, 1929.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Appellant.
GEORGE W. COLLES,
Attorney for Appellee.

Approved June 20, 1929.

Per curiam. BUFFINGTON, *C. J.*

(Endorsements:) No. 4158. Stipulation of counsel. Received & filed Jul. 5, 1929. William P. Rowland, clerk.

165 [Clerk's certificate to foregoing paper omitted in printing.]

166 In United States Circuit Court of Appeals for the Third Circuit

No. 4159. October term, 1929

HERSHEY CHOCOLATE COMPANY, APPELLANT

vs.

M. LOUISA DAVIS, EXECUTRIX OF B. F. DAVIS, FORMERLY UNITED States Collector of Internal Revenue for the Ninth District of Pennsylvania, deceased, appellee

Stipulation.

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4157, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Reve-

nue for the First District of Pennsylvania, appellee, U. S. C. C. A., Third Circuit, October term, 1929, No. 4157.

Dated June 17, 1929.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved June 20, 1929.
Per curiam. BUFFINGTON, *C. J.*

(Endorsement:) 4159. Stipulation of counsel. Received & filed Jul. 5, 1929. William P. Rowland, clerk.

167 [Clerk's certificate to foregoing paper omitted in printing.]

168 In United States Circuit Court of Appeals for the Third Circuit

No. 4160. October term, 1929

HERSHEY CHOCOLATE COMPANY, APPELLANT

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY United States Internal Revenue Collector for the First District of Pennsylvania, deceased, appellee

Stipulation.

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4157, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, appellee, U. S. C. C. A., Third Circuit, October term, 1929, No. 4157.

Dated June 17, 1929.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved June 20, 1929.
Per curiam. BUFFINGTON, *C. J.*

(Endorsement:) 4160. Stipulation of counsel. Received & filed Jul. 5, 1929. William P. Rowland, clerk.

169 [Clerk's certificate to foregoing paper omitted in printing.]

170 In United States Circuit Court of Appeals for the Third Circuit

No. 4161. October term, 1929

HERSHEY CHOCOLATE COMPANY, APPELLANT,
vs.
BLAKELY D. McCAUGHN, FORMERLY UNITED STATES COLLECTOR OF internal revenue for the first district of Pennsylvania appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States collector of internal revenue for the first district of Pennsylvania, appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4157, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States collector of internal revenue for the first district of Pennsylvania, appellee, U. S. C. C. A., Third Circuit, October term, 1929, No. 4157.

Dated June 17, 1929.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved June 20, 1929.
Per curiam.

BUFFINGTON, *C. J.*

(Endorsement:) 4161. Stipulation of counsel. Received & filed Jul. 5, 1929. William P. Rowland, clerk.

171 [Clerk's certificate to foregoing paper omitted in printing.]

172 In United States Circuit Court of Appeals for the Third Circuit

No. 4162. October term, 1929

HERSHEY CHOCOLATE COMPANY, APPELLANT
vs.
M. LOUISA DAVIS, EXECUTRIX OF B. F. DAVIS, FORMERLY UNITED States Collector of Internal Revenue for the Ninth District of Pennsylvania, deceased, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this

case shall be controlled by and conform to the ultimate decision in the case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4157, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Hershey Chocolate Company, appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, appellee, U. S. C. C. A., Third Circuit, October term, 1929, No. 4157.

Dated June 17, 1929.

F. LYMAN WINDOLPH,
WM. CLARKE MASON,
JOHN E. SNYDER,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved June 20, 1929.
Per curiam.

BUFFINGTON, *C. J.*

(Endorsement:) 4162. Stipulation of counsel. Received and filed July 5, 1929. William P. Rowland, clerk.

173 [Clerk's certificate to foregoing paper omitted in printing.]

174 Supreme Court of the United States

No. 426. October term, 1930

B. D. McCAUGHN, COLLECTOR, PETITIONER
vs.
HERSHEY CHOCOLATE CO.

Order allowing certiorari.

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

175 Supreme Court of the United States

No. 427. October term, 1930

Est. E. Ledderer, Collector, petitioner

vs.

Hershey Chocolate Co.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

176 Supreme Court of the United States

No. 428. October term, 1930

Est. B. F. Davis, Collector, petitioner

vs.

Hershey Chocolate Co,

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

177 Supreme Court of the United States

No. 429. October term, 1930

Est. E. Ledderer, Collector, petitioner

vs.

Hershey Chocolate Co.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is

further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

178 Supreme Court of the United States

No. 430. October term, 1930

B. D. McCAUGHN, COLLECTOR, PETITIONER

vs.

HERSHEY CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

179 Supreme Court of the United States

No. 431. October term, 1930

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

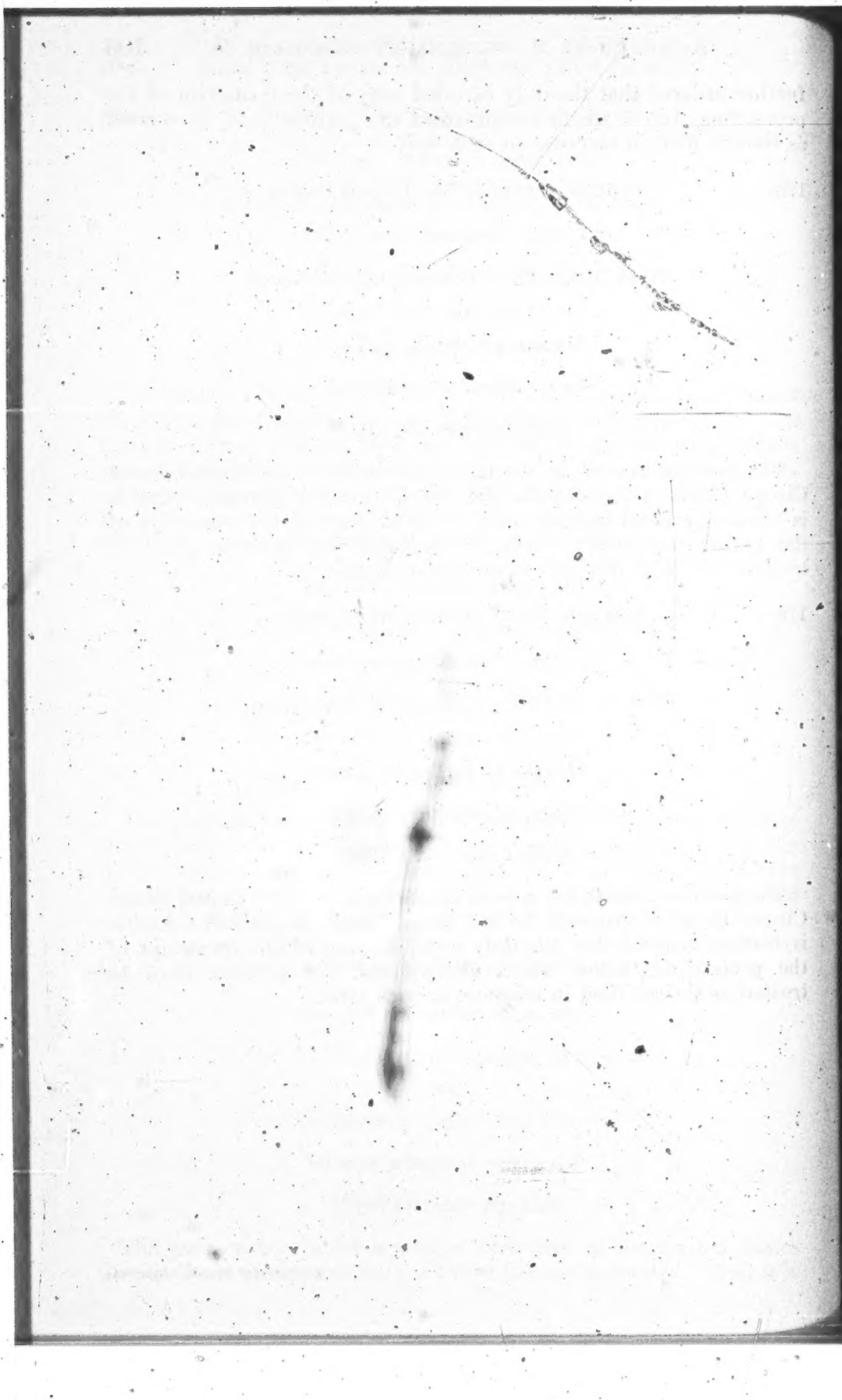
HERSHEY CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1930



TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 435

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. 432

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. 433

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. 434

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1930.
CERTIORARI GRANTED OCTOBER 20, 1930.

(35357, 35354, 35355, 35356)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. —

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. —

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. —

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

No. —

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

June term, 1925. No. 11592

KLEIN CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE

Docket Entries

S. V. Hosterman, C. J. Hepburn, Wm. Clarke Mason.
George W. Coles.
Aug. 12, 1925. Præcipe to issue summons filed.
Aug. 12, 1925. Summons exit—returnable 1st Monday in September, 1925.
Aug. 14, 1925. Summons returned on August 13 served and filed.
Aug. 20, 1925. Appearance of George W. Coles for defendant.
May 28, 1926. Statement of claim filed.
May 28, 1926. Notice to file affidavit of defense filed.
Jan. 4, 1927. Affidavit of defense filed.
Mar. 1, 1928. Stipulation to try case before court without a jury filed.
Mar. 20, 1928. Præcipe to place case on argument list filed.
May 21, 1928. Trial before court without a jury.
May 22, 1928. Trial resumed—witnesses sworn.
June 7, 1928. Plaintiffs request for findings of fact and conclusions of law filed.
June 7, 1928. Argued sur P. & P.
June 14, 1928. Testimony filed.
Nov. 22, 1928. Findings of fact and conclusions of law filed.
2 November 22, 1928. Opinion of the court filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926, No. 12360).
Nov. 22, 1928. On motion of counsel for plaintiff, reargument ordered for December 4, 1928.
Dec. 4, 1928. Reargument sur findings of fact.
January 17, 1929. Opinion sur reargument filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926—No. 12360).
January 22, 1929. Opinion filed November 22, 1928, withdrawn and revised opinion filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term 1926, No. 12360).
Jan. 26, 1929. Plaintiff's exceptions filed.
Jan. 26, 1929. Plaintiff's bill of exceptions and order of court sealing same, filed.
Apr. 22, 1929. Præcipe to enter judgment filed.
Apr. 22, 1929. Judgment in favor of defendant filed.

May 17, 1929. Assignments of error filed.
May 17, 1929. Petition for appeal filed.
May 17, 1929. Order of court granting appeal filed.
May 17, 1929. Præcipe for transcript of record sur appeal filed.
June 10, 1929. Bond sur appeal and order of court approving same filed.
June 10, 1929. Citation allowed and issued.
June 10, 1929. Copy of notice of appeal filed.
June 11, 1929. Citation returned "service accepted" and filed.

3 In United States District Court

[Title omitted.]

Plaintiff's statement of claim

Filed May 28, 1926

The Klein Chocolate Company, the above-named plaintiff, complaining of the above-named defendant, brings this action against Blakely D. McCaughn, internal revenue collector, the defendant above named, upon a cause of action whereof the following is a statement.

1. The plaintiff is a corporation duly organized and existing under the laws of Pennsylvania, having its principal place of business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the district in which the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and
4 sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9) did, for the period aforesaid, assess excise taxes against the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80 and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6) likewise assess excise taxes against the plaintiff aggregating $82,314.12, being 3% of the said sales of $2,743,804, under the guise that sweet chocolate and sweet milk chocolate was "candy."

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of the said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the time hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, excise taxes amounting to $102,066.76 more particularly set forth as follows:

Tax for month of	Date paid	Check No.	On bank	Amount paid
July, 1921	8/30/21	751	Corn Exch. Nat'l, Philadelphia, Pa.	$1,618.62
Aug., "	9/29/21	808	Peoples Trust Co., Lanc., Pa.	3,696.87
Sept., "	10/31/21	618	" " " " "	2,866.16
Oct., "	11/30/21	637	" " " " "	3,899.63
Nov., "	12/31/21	31762	Elizabethtown National	4,094.62
Dec., "	1/31/22	32306	" "	3,872.72
Total				19,732.54
8 Jan., 1922	2/28/22	702	Peoples Trust Co., Lanc., Pa.	2,089.92
Feb., "	3/31/22	777	" " " " "	2,153.40
Mar., "	4/29/22	747	" " " " "	1,916.50
April, "	5/31/22	798	" " " " "	1,447.47
(Special)	6/10/22	797	" " " " "	3,242.43
Made up as follows:				
Additional tax				$2,375.23
5% Penalty				118.76
Interest to June 30, 1920				174.59
Interest 7/1/20-6/1/22				573.85
				3,242.43
May, 1922	6/30/22	809	Peoples Trust Co., Lanc., Pa.	1,883.43
June, "	7/31/22	33896	Elizabethtown National	1,814.39
July, "	8/31/22	831	Peoples Trust Co., Lanc., Pa.	1,495.56
Aug., "	9/30/22	848	" " " " "	2,409.45
Sept., "	10/31/22	874	" " " " "	2,852.91
Oct., "	11/29/22	901	" " " " "	2,790.93
Nov., "	12/30/22	915	" " " " "	2,837.39
Dec., 1922	1/31/23	940	" " " " "	2,041.63
Jan., 1923	2/28/23	980	" " " " "	2,868.44
Feb., "	3/31/23	992	" " " " "	2,929.06
Mar., "	4/30/23	1023	" " " " "	2,192.13
April, "	5/31/23	1056	" " " " "	2,481.19
May, "	6/30/23	1081	" " " " "	2,869.42
June, "	7/31/23	1112	" " " " "	2,052.23
July, "	8/31/23	1144	" " " " "	2,020.61
Aug., "	9/29/23	26	Lancaster Trust Co., " "	2,571.61
Sept., "	10/31/23	1189	Peoples Trust Co., " "	4,123.61
Oct., "	11/30/23	45	Lancaster Trust Co., " "	4,226.23
Nov., "	12/31/23	1226	Peoples Trust Co., " "	2,600.67
Dec., "	1/31/24	1246	" " " " "	1,542.53
Jan., 1924	2/29/24	1268	" " " " "	2,920.55
Feb., "	3/31/24	1285	" " " " "	2,763.64
Mar., "	4/30/24	1298	" " " " "	2,913.41
Apr., "	5/31/24	1317	" " " " "	2,815.95
May, "	6/30/24	1336	" " " " "	2,705.49
June, "	7/31/24	89	Lancaster Trust Co., " "	2,363.21
July 1st and July 2nd	8/29/24	1373	Peoples Trust Co., " "	40.80
Total				82,314.12

SUMMARY

Tax paid at 5% is	$19,732.64
Tax paid at 3% is	82,314.12
Grand total	102,066.76

6. The revenue acts of 1918 and 1921 aforesaid did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate nor upon "tea, coffee, and cacao products."

7. The sweet chocolate and sweet milk chocolate manufactured and sold by plaintiff, as hereinbefore stated, upon the sales of which plaintiff paid a tax to defendant involuntarily and under protest, as hereinbefore stated, are not in fact or law candy, but are the product of cacao (cocoa) beans which are the seeds of the cacao tree, roasted, broken and freed from husks, shells, and germs without the removal of other constituents.

8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists of the United States, and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

9. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular No. 136 of the United States Department of Agriculture which contains the following:

7 (Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products."

"c. Cacao Products."

(1) Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

(2) Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

(3) Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

(4) Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fibre, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

(5) Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

(6) Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fibre or starch than is found in the sugar and fat-free residue of chocolate.

8 (7) Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

(8) Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

(9) Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

(10) Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat-free residue of chocolate.

(11) Milk Chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product.

10. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C." "Sugars and Related Substances," under which classification is included "Candy," and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "c. Candy." which is therein defined as "a product made from a saccharine substance or substances."

11. There is no authority vested by Act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America, and the only legal standards of purity, classification, and definitions of food products for the United States of America are the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to.

12. The tax paid by plaintiff to defendant as aforesaid, was collected by defendant wrongfully, illegally, and without warrant in law, and to the damage of plaintiff.

13. The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected as per copies of said notices of rejection hereto attached and marked respectively "Exhibit A," and "Exhibit B," which said exhibits are made a part hereof.

14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

15. Wherefore the plaintiff says that the defendant is indebted to it upon an oral contract, to wit, a contract implied in law, in the

sum of $102,066.76, with interest thereon from the aforesaid several dates of payment, made under protest, and demands judgment against the defendant for that amount with costs.

S. V. HOSTERMAN,
Atty. for Plf.

Office and post office address, Lancaster, Pennsylvania.

10 *Duly sworn to by Wm. Klein. Jurat omitted in printing.*

Exhibit "A" to statement of claim

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Nov. 26, '24.

Address reply to Commissioner of Internal Revenue and refer to MT-ST-CLV, Cls. 332319-324, incl.

KLEIN CHOCOLATE COMPANY,
Elizabethtown, Pa.

GENTLEMEN: Reference is made to claims filed by you for refund of $31,981.65, $34,698.36, $34,895.57, $11,422.78, $35,821.68, and $31,031.45 representing manufacturer's excise taxes alleged to have been erroneously paid for the period February, 1919, to April, 1924, inclusive.

The claims are based upon the contention that the
11 amounts involved were erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products with respect to which the tax involved was paid were properly taxable as candy under section 900 of the revenue acts of 1918 and 1921.

Your claims are, therefore, rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

EMT

Exhibit B to statement of claim

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 3, 1925.

Address reply to Commissioner of Internal Revenue, and refer to MT:ST:JPM. Cl-338560

KLEIN CHOCOLATE COMPANY,
Brown Street, Elizabethtown, Pennsylvania.

GENTLEMEN: Reference is made to your claim filed for the refund of $5,161.53, alleged to have been erroneously paid as manufacturer's excise tax for the period May, 1924, to July, 1924.

Your claim is based upon the contention that the amount involved was erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products, with respect to which the tax involved was paid, were properly taxable as candy under sections 900 of the revenue acts of 1918 and 1921.

Your claim therefore is rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

VFM

12 In United States District Court

[Title omitted.]

Affidavit of defense

Filed January 4, 1927

STATE OF PENNSYLVANIA,
County of Lancaster, ss:

Blakely D. McCaughn, being duly sworn according to law, deposes and says that he is the defendant named in the above-entitled case, and that he has a full, just, true, and legal defense to the whole of the plaintiff's claim of the character and nature as follows, to wit:

1. He admits the allegations of the first paragraph of plaintiff's statement of claim.

2. He admits the allegations of the 2nd paragraph.

3. He has no information as to the allegations contained in the 3rd paragraph of plaintiff's statement of claim nor has he any means of ascertaining whether the facts therein stated are true or not, and he therefore calls for strict proof thereof.

4. He admits the allegations of the 4th paragraph.

5. He admits the allegations of the 5th paragraph.

6. He denies that the revenue acts of 1918 and 1921 did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate.

13 7. He denies that the sweet chocolate and sweet milk chocolate manufactured and sold by the plaintiff upon which taxes were collected and paid, as aforesaid, were not "Candy" within the meaning of the revenue acts of 1918 and 1921.

He avers that the sweet chocolate and sweet milk chocolate manufactured and sold by the plaintiff were "Candy" within the meaning of subdivision 9 of section 900 of the revenue act of 1918; and within the meaning of subdivision 6 of section 900, Title IX of the revenue act of 1921; and that Congress levied an excise tax thereon.

8. He admits the allegation in the 8th paragraph in so far as they refer to authority in the Secretary of Agriculture "to establish standards for food products"; but aver that they are matters wholly immaterial to the issue in this case.

9. He admits the allegations of the 9th paragraph but avers that they are wholly irrelevant and immaterial to the issues in this case.

10. He admits the allegations of the 10th paragraph but avers that they are wholly irrelevant and immaterial to the issues in this case.

11. He admits the allegations of the 11th paragraph but avers that they are wholly immaterial and irrelevant to the issues in this case.

12. He denies that the tax collected, as aforesaid, was wrongfully and illegally collected; but avers that there was warrant in law for the tax collected by the defendant, and that such taxes were sustained by the Circuit Court of Appeals for the First Circuit in the case of Malley, Collector v. Walter Baker and Company, Limited, reported in 281 Federal Reporter, at page 41.

He further avers that the tax collected, as aforesaid, was
14 rightfully and legally collected on the manufacture and sale of sweet chocolate and sweet milk chocolate manufactured by the plaintiff.

13. He admits the allegations of the 13th paragraph.

14. He admits the allegations of the 14th paragraph.

15. He denies that the defendant is indebted to the plaintiff in any amount or that the plaintiff is entitled to recover, under implied contract or otherwise, from the defendant in any amount.

All the facts herein stated of defendant's own knowledge are true; the facts stated upon information from others he believes to be true; and all of them he expects to be able to prove upon the trial of this cause.

B. D. McCaughn,

Subscribed and sworn to before me this 4th day of January, 1926.

[NOTARIAL SEAL.] Anthony T. Mita, *Notary Public.*

My commission expires March 2, 1929.

15 In United States District Court

[Title omitted.]

Stipulation waiving jury

Filed March 1, 1928

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States revised statutes.

George W. Coles,
United States Attorney.
C. J. Hepburn,
Attorney for Klein Chocolate Company.

Philadelphia, Pa., *Feb. 28, 1928.*

16 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BRAKELY D. McCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

*Opinions of the court**

KIRKPATRICK, *J.*,

Filed November 22, 1928

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected as typical, for an opinion.

17 The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3 per cent instead of 5 per cent.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as tax-

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* NOTE.—This opinion (filed November 22, 1928), for which the revised opinion of January 22, 1929, was substituted, was changed by the latter in the following particulars only:

(a) The sentence, "This decision had been appealed from and the case was pending in the Circuit Court of Appeals," appearing in the 11th and 12th lines of page 19 was omitted from the revised opinion.

(b) The words, "the pending," appearing in the 2nd and 3rd lines from the bottom of page 19 were omitted from the revised opinion.

(c) The words "concededly not an eo nomine description" appearing in the 17th and 18th lines of page 24 were omitted from the revised opinion.

See pages 31 to 40, both inclusive, for revised opinion.

able under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy
18 departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: Solid chocolate bon bons, "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as "a confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty

years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. This decision had been appealed from and the case was pending in the Circuit Court of Appeals. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a District Court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the members of congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on the pending appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts but including several revenue acts) enacted over a period

of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specifically provided for in this section" and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff acts of March 3, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes
21 referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 163, and other cases.

These decisions announce a well established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding therefore that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation,

and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved cannot be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity
22 and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed; and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485. A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so cerain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted
23 in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53

Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore, not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v.
24 Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term concededly not an eo nomine description, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is

proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite directions, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the Court: W. H. KIRKPATRICK, *J.*

26 In United States District Court

[Title omitted.]

Findings of Fact

Filed Nov. 22, 1928

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

CONCLUSIONS OF LAW

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the Court:

W. H. KIRKPATRICK, *J.*

27 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Opinion sur re-argument

KIRKPATRICK, *J.*

Filed January 17, 1929

At the request of the plaintiffs the court granted a re-argument in the sixteen cases of which the above entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court in referring to the decision of the District Court

of Massachusetts in Malley v. Walter Baker & Company stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases.

"In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, No. 12360, June term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are: First, that the above manner of finding facts is not proper practice, and second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge, and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of proper practice in stating the fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given

to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say: "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect of the opinion in that case to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all.

The act there under consideration was a special act allowing a suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy" however we have just the opposite situation. Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co. # 94, October term, 1928) the general rule referred to is reaffirmed. The court said: "Decisions of this court, where the letter

of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve justice, oppression or absurdity, United States, v. Goldenberg, 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in other acts of Congress. That matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the later considerations were the more important and controlling ones.

The conclusions reached in the opinion filed will not be changed.

By the court.

W. H. KIRKPATRICK, *J.*

31 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Revised opinion of the court

KIRKPATRICK, *J.*

Filed January 22, 1920

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

The relevant provision of the revenue act of 1918 is as follows: "That there shall be levied, assessed, collected and paid upon the

following articles sold or leased by the manufacturer, producer or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

32 The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are "solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the prod-
33 ucts in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under the act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time of the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual Members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to

require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between
35 chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section" and "Unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 8, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 162, and other cases.

36 These decisions announce a well-established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in

the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding therefore that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved cannot be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485.

A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be
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Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while

the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore, not open to construction), and yet both have advanced a number of arguments based
38 upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, so nominé, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product.

What was decided was that where there is a word in a statute
39 which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the

latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a great number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the Act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point.

While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

41 In United States District Court

KLEIN CHOCOLATE COMPANY, PLAINTIFF

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR Eastern District of Pennsylvania, defendant

Plaintiff's bill of exceptions

CAPTION

Be it remembered that in the said term of June, 1925, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared (prout statement) and the said defendant pleaded (prout plea). And thereupon issue was joined between them.

And thereafter by stipulation filed of record on the 1st day of March, 1928, it was "stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes."

And afterwards, to wit, at a session of the said court, held in the district aforesaid before the Honorable W. H. Kirkpatrick, judge of the said court, on the 21st day of May, 1928, the said issue between the said parties came to be tried by the court without a jury, at which day came as well the said plaintiff as the said defendant by their respective attorneys; and upon the trial, the witnesses being duly sworn or affirmed the following testimony was produced:

42 Transcript of Testimony and Rulings

[Title omitted.]

Before KIRKPATRICK, *J.*

Philadelphia, Pa., Monday, May 21, 1928, at 10.00 o'clock a. m., eastern daylight saving time.

Present: William Clarke Mason, Esq., C. J. Hepburn, Esq., S. V. Hoffman, Esq., and Wm Barclay Lex, Esq., for plaintiff;

R. W. Wilson, Esq., and Mark Thatcher, Esq., for defendant.

Plaintiff's evidence and stipulated facts

Mr. MASON. If your honor please, in cases brought by the Hershey Chocolate Company against B. F. Davis, formerly collector, Nos. 10726 and 10824, and in cases brought by the Hershey Chocolate Company against Ephraim Lederer, formerly collector, Nos. 10822 and 10826, we ask leave to file stipulations amending the name of the defendant by substituting "Executrix" in each case, both of those defendants having died and executrixes having been appointed. In the case of B. F. Davis, we substitute "M. Louisa Davis" as the executrix of the estate of the said B. F. Davis, deceased, and in the case of Ephraim Lederer, we substitute "Grace N. Lederer" as the executrix of the estate of Ephraim Lederer, deceased.

If your honor please, if I may, before starting the proof, I will outline to you, in a very brief way, just what the problem of procedure is that we have here, and ascertain whether it meets with your honor's approval.

48 There are sixteen cases all told, three of them in which the Wilbur-Suchard Chocolate Company is plaintiff, four in which the Klein Chocolate Company is plaintiff, three in which the York Chocolate Company is plaintiff, and six in which the Hershey Chocolate Company is plaintiff, all of them against the Collector of Internal Revenue in office at the time the taxes were paid, and all of them for the payment to the plaintiffs of moneys paid by the manufacturers for excise taxes upon candies under the Act of 1916 and 1921.

Counsel for the Government and counsel for the plaintiffs have found in these cases that, so far as we can see in advance of the proof, substantially all of them involve the same questions. There may be some variations, however, in the proofs in relation to the products of one manufacturer that will not be the same as the proofs in relation to the products of other manufacturers, and on the assumption that that difference may arise, and to protect the record, which is being made in so many cases, tried together, the plan which we propose is this, sir: That the admitted facts in the record of pleadings be put upon the record in each one of the sixteen cases, that the documentary proof, in so far as it is general—and I think it will be general as to all of them—be offered as to all of the cases, that means as to each of them be offered at the one time, that when it comes to oral proof, the witness, when called, shall be called as a witness in the case of one or the other plaintiffs, and that his testimony shall be taken as though given in each of the cases for that particular plaintiff, but as to no others until his testimony is concluded along the particular line in which the examination and cross examination is desired, that at the end of the examination of that particular witness, counsel will then indicate—presumably by agreement—whether, in addition to the testimony being taken for the

cases of one of the four plaintiffs, it shall also be taken for the cases of the other three plaintiffs.

The COURT. At the conclusion?

44 Mr. MASON. At the conclusion of that testimony, and we will then indicate, for the record purposes, how far beyond the original call the testimony shall be extended, in order that not only the court and counsel may have an appreciation of the record facts for the several cases, and the limitation of them, but that the stenographer, in making the record for us, will be guided at that time in the reference to the extent to which that testimony is to be applied, and we expect, sir, that by so doing, we will not only be able to keep these cases and the record of them clearly in line, but that we will be able substantially to save the time of the court and expedite the trial.

The COURT. How many records are you going to make?

Mr. MASON. Our thought——

The COURT. That is surely a way to save time, but what are you going to do about the record?

Mr. MASON. Our thought, sir; we will make our records, and at the end of the hearings before your honor, if all of the testimony is general, we will ask that one record be made up for your honor's consideration and the consideration of counsel.

The COURT. If all the testimony——

Mr. MASON. If all of the testimony applies to all of the cases.

The COURT. For instance, if you call a witness in the three Wilbur cases, and all the testimony applies to all of them——

Mr. MASON. We will make up the one record.

The COURT. Suppose you call a witness in Wilbur, and Klein says that his testimony is applicable to him, and Hershey says no, then you will have to make a separate record?

Mr. MASON. Then, there will be separate records made, but when I speak of making up one record at the end of the testimony, I mean one record preliminarily. Of course, there will be eventually, in all probability, a complete transcript of all of the cases. We will endeavor to so present it that you will not have in the preliminary stage of consideration of these cases more than the one 45 record except where certain testimony is applicable to certain cases only, and in that event, of course, a separate record will be made up for those cases.

Now, sir, pursuant to the agreement made with counsel for the Government and counsel for the plaintiffs, in the opening we desire to offer in evidence those facts set forth in the sixteen statements of claim, which have been admitted by the affidavit of defense or by consent of counsel.

The COURT. Have you copies of those statements?

Mr. MASON. I am going to give your honor a copy of each one, and to state to your honor that on the face of each statement of claim there is marked by lead pencil bracket, on the outside mar-

gin, the admitted facts. In several of the paragraphs there are internal brackets, which relate to words in those paragraphs to be excluded, and we shall ask that the stenographer note, for the purposes of the record, in each case those portions of the statement of claim which are indicated as I have stated, and include them as a part of the record of each case from the pleadings and admissions of counsel as facts admitted in these cases with the same force and effect as if they had been otherwise proved.

For the purpose of the record, may I say this: That in all of the statements of claim where reference is made in language similar to the language in the case of Wilbur-Suchard Company against Grace N. Lederer, No. 10774, to the standards for food products and the definitions of the same, set forth in that statement of claim in paragraphs 7, 8 and 9, the Government—while the pleadings admit the facts as stated in those paragraphs are true—desires to note an objection, and will press and argue the objection to your honor on the admissibility of those facts relating to those standards in these cases, and I call the attention of your honor, for record purposes, that that objection is to be noted wherever those paragraphs appear in the record of each of the cases.

46 The paragraphs referred to are as follows:

7. The act of Congress of June 3, 1902, and supplements, authorized the Secretary of Agriculture to establish standards of purity for food products and to classify the same. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such statutory authority, are the official standards of such food products for the United States of America.

8. The standard of purity for food products established by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture and contain the following:

(Circular 136, page 18)

"E. Tea, Coffee, and Cacao Products

"c. Cacao Products

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

47 "6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product.'"

9. The standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and Related Substances," under which classification is included "candy," and the said standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "candy."

48 In addition to the numbered paragraphs in each of the sixteen cases, to which reference is made for the admitted facts, I also offer in evidence the letters attached to the several statements of claim as exhibits in each of the cases to which the letters appear as exhibits, from the Department of Internal Revenue, in which there is set forth the fact that claims for refunds made have been rejected. Those letters are admitted to have been sent by the Department and received by the plaintiffs, and are part of the records of these cases.

So that your honor and all of us on this side of the bar will appreciate just what is involved by these admissions, I call your honor's attention to a typical case, and I am reading from Wilbur-Suchard, No. 10774. The first paragraph sets forth the identity of the plaintiff, and the second the identity of the defendant. The third sets forth the fact that during the period in question the plaintiff sold to its customers sweet chocolate and sweet milk chocolate having a selling price of the amount therein set forth. Those sales will not be made evident by the details of the records. They have been examined and covered by counsel for both parties, and the facts are admitted.

The fourth paragraph sets forth the assessment of the excise tax under the revenue act of either 1918 or 1921.

The fifth sets forth the fact that, under protest, the returns were made and the tax paid.

The seventh, eighth, and ninth paragraphs are the paragraphs setting forth the fact that under the act of Congress of June 3, 1902, and supplements, the Secretary of Agriculture established standards of purity for food products, classified the same and defined those which are set forth in the classification.

The tenth.——

The COURT. He says that he is authorized to establish standards and to classify, but where does he say he defines them?

Mr. MASON. We set forth the fact, sir, that the standards of purity of food products, together with their precedents definitions established by the Secretary of Agriculture, pursuant to statutory authority, are the official standards of such food products of the United States of America.

The COURT. Yes.

Mr. MASON. Then, in paragraph ten, the admitted fact is that there is no authority vested by the act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America.

The twelfth provides that we have complied with the required regulations and statutory proceedings to claim our refund, and that the refunds were denied, and that the refund of the tax as made, has been refused.

Your honor, therefore, has before you the admitted facts in this case, with the Government's objections to the relevancy of the standards, and if Mr. Thatcher deems it well, we might dispose of that question now, so that we may have your honor's thought about it.

Mr. WILSON. If your honor please, it is admitted, as alleged in the various statements of claim of all these cases, that the Department of Agriculture has been given authority, under the act of Congress, to establish and maintain standards and classifications of food products. We have no quarrel with that proposition at all.

The Government contends that in the instant cases these allegations relating to the authority of the Secretary of Agriculture are immaterial and irrelevant, by virtue of the fact that, under the act of Congress of 1918 and also of 1921, the Commissioner of Internal Revenue was given express authority to promulgate such rules and regulations as would be reasonable, and would amount to a reasonable interpretation and application to all subjects taxed under the revenue acts. The Congress did not attempt, at the time of the passing of those acts, to add any interpretation of any words used.

In section 900, subdivision IX, we find the single word "candy." Under that section 900, an excise tax, manufacturer's excise tax, of 5 per cent will be levied on candy, and, pursuant to that section, the commissioner, by virtue of the authority vested in him by Congress, proceeded to define "candy" and to levy this tax of 5 per cent on products which come within that definition.

The COURT. What is it the Department of Agriculture defines?

Mr. WILSON. The plaintiffs in these cases having alleged in paragraphs 7, 8, and 9—they have dealt somewhat with the history of the congressional act, under and by virtue of which the Secretary

of Agriculture has been given authority to establish standards of purity for food products, and, as I say, we do not dispute that——

The COURT. Yes, sir; but what does it say? I have not read it. In what way does the Department of Agriculture define it?

Mr. WILSON. The Department of Agriculture has issued certain circulars, which are quoted verbatim in these statements of claim, in paragraph 8, wherein it is alleged that the standard of purity for food products was in force May 1, 1919.

The COURT. They put sweet chocolate under the head of——

Mr. WILSON. By the Department of Agriculture sweet chocolate is considered under the head of subdivision "E. Tea, coffee, and cacao products."

The COURT. Yes, all right. It does not happen to be under candy?

Mr. WILSON. No; in the Department of Agriculture it is handled under "Sugars and related substances."

The COURT. Go ahead.

Mr. WILSON. And our contention is that these allegations are wholly immaterial to the issues in this case by virtue of the fact that Congress has, in its revenue acts, specifically designated a certain product, which it says shall be taxed and defines that product, and names it as "candy" and pursuant to that congressional act, the commissioner has set up a definition for taxation purposes, in 51 which the words "milk chocolate" and "sweet chocolate" shall be used and defined as "candy."

It is our contention that whatever authority the Department of Agriculture may have, it is wholly immaterial. We do not deny it, but we do not see where it has any place in these cases. The fact that in the Department of Agriculture "candy" and the other term that was used, "sugars and related substances," are in a separate and distinct classification, may be changed, does not take away from Congress, in 1918, the right to say that a certain product "candy" may be taxed, nor does it take away from the Commissioner of Internal Revenue, under the authority that is vested in him by the Internal Revenue Acts, the right to so treat sweet milk chocolate.

Mr. MASON. With your honor's permission and with the consent of the Government, in view of the argument that has been advanced by Mr. Wilson, I am going to amplify the offer.

The COURT. How are we on the record? Has this offer been objected to on the ground that it is immaterial?

Mr. MASON. As I understand, the Government has objected to the admission of paragraphs 7, 8, and 9 in the case that I read from, and to the other statements in the other cases of a similar nature, on the ground of irrelevancy.

In view of the fact that it was my purpose later to elaborate those averments by offering the full circulars—the standards and the definition—so that the record would be complete, I will offer those now, and I understand the Government makes the same objection.

Mr. WILSON. Yes.

Mr. MASON. The Government makes the same objection to those offers, and I will direct my answer to the Government's objection.

The offer, which is now made, is the offer of the—

Circular No. 10, issued by the Department of Agriculture, on November 20, 1903, entitled "Standards of Purity for Food Products";

52 Circular No. 13, issued by the Department of Agriculture, on December 20, 1904, entitled "Standards of Purity for Food Products";

Circular No. 17, issued by the Department of Agriculture, on March 8, 1906, entitled "Standards of Purity for Food Products";

Circular No. 19, issued by the Department of Agriculture, on June 26, 1906, entitled "Standards of Purity for Food Products";

Circular No. 136, issued by the Department of Agriculture, on May 14, 1919, entitled "Standards of Purity for Food Products";

A certified copy of what is entitled "Food Inspection Decision 165 (generally known as "F. I. D."), issued by the Secretary of Agriculture, February 15, 1916; and

A similar food inspection decision, No. 191, issued by the Department of Agriculture, January 19, 1923.

(Papers in question marked "Plaintiff's Exhibits 1 to 7," respectively, both numbers inclusive.)

Mr. MASON. Those include a statement and make reference to the authority on which action was taken by the Secretary of Agriculture, and form the basis for the promulgation of those circulars and decisions.

That authority goes back to the act of June 3, 1902, which is to be found in 32 Statutes at Large, 286, on page 296, in which Congress states: That the authority was given and the appropriation was made, as set forth in that act, to enable the Secretary of Agriculture, in collaboration with the Association of Official Agriculture Chemists and such other experts as he may deem necessary, to establish standards of purity for food products, and to determine what are regarded as adulterations therein for the guidance of the officials of the various States and of the courts of justice.

Pursuant to that authority, the Secretary secured the assistance of various official bodies, those who participated in the compilation of the standards and the definitions being referred to in the 53 official documents issued by the Secretary, and included in them was Dr. Charles A. Crampton, chemist for the Bureau of Internal Revenue, as well as the representatives of the various organizations throughout the country, competent to express opinions concerning the products covered by the regulations, and competent to aid in making a definition for them.

Your honor will find in these official documents that there is given the classification to "chocolate" in the regulations, that were in force at the time the act of 1918 was passed and "candy," which clearly differentiates the two products, and having been so classified, and

having been defined, as you will see in those regulations, we have, by authority of Congress itself, a designation for the one and for the other, which separates them as different things, and those classifications having been made pursuant to the authority given by Congress in 1902, being in force in 1918, being compelled upon all the other Departments concerned with the law applicable to the subject matter of the regulations, they are offered here as evidence to establish the fact that at the time the act of 1918 and the act of 1921 were passed, there was in the mind of Congress, as a result of the action taken pursuant to this authority, a clear distinction between "candy" and "sweet chocolate," and for that reason and for the further reason that not only was Congress thereby guided, but as the acts themselves said, they were for the guidance of the courts of justice—and we are now in a court of justice—we think it is most appropriate that they should be made a part of the record in this case, as an aid to determining what is the meaning that Congress gave to the word "candy" when it adopted that designation as the basis for classification and taxation.

The COURT. The ruling of the court will be reserved on this question. Proceed with the case.

(Copies of the paragraphs in plaintiff's statement of claim, heretofore referred to, follow:

1. The plaintiff is a corporation, duly organized and existing under the laws of Pennsylvania, having its principal place of
54 business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the district in which the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), did for the period aforesaid, assess excise taxes against the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80 and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6), likewise assess excise taxes against the plaintiff aggregating $82,314.12 being 3% of the said sales of $2,743,804 under the guise that sweet chocolate and sweet milk chocolate was "candy."

5 In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of the said sales
55 of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, excise taxes amounting to $102,066.76 more particularly set forth as follows:

Tax for month of—	Date paid	Check No.	On bank	Amount paid
July, 1921	8/30/21	751	Corn Exch. Nat'l, Philadelphia, Pa	$1,618.92
Aug., "	9/29/21	893	Peoples Trust Co., Lanc., Pa	3,690.67
Sept., "	10/31/21	618	" " " " "	2,886.18
Oct., "	11/30/21	637	" " " " "	3,599.65
Nov., "	12/31/21	37762	Elizabethtown National	4,084.43
Dec., "	1/31/22	32506	" "	3,872.72
Total				19,752.64
Jan., 1922	2/28/22	702	Peoples Trust Co., Lanc., Pa	2,099.62
Feb., "	3/31/22	727	" " " " "	2,153.40
Mar., "	4/29/22	747	" " " " "	1,916.50
April, "	5/31/22	788	" " " " "	1,447.47
(Special)	6/10/22	797	" " " " "	3,242.62
Made up as follows:				
Additional tax				$2,377.25
5% penalty				118.76
Interest to June 30, 1930				174.88
Interest 7/1/20-6/1/22				573.85
				3,242.62
May, 1922	6/30/22	906	Peoples Trust Co., Lanc., Pa	1,853.45
June, "	7/31/22	33708	Elizabethtown National	1,814.20
July, "	8/31/22	831	Peoples Trust Co., Lanc., Pa	1,485.78
Aug., "	9/30/22	948	" " " " "	2,403.45
Sept., "	10/31/22	974	" " " " "	3,852.91
Oct., "	11/29/22	901	" " " " "	2,790.66
Nov., "	12/30/22	915	" " " " "	2,827.30
Dec., 1922	1/31/23	940	" " " " "	3,049.63
Jan., 1923	2/28/23	960	" " " " "	2,803.44
Feb., "	3/31/23	992	" " " " "	2,929.08
Mar., "	4/30/23	1042	" " " " "	3,102.13
April, "	5/31/23	1056	" " " " "	2,951.19
May, "	6/30/23	1081	" " " " "	2,889.42
June, "	7/31/23	1112	" " " " "	2,052.23
July, "	8/31/23	1144	" " " " "	2,020.61
Aug., "	9/29/23	26	Lancaster Trust Co., " "	3,571.81
Sept., "	10/31/23	1189	Peoples Trust Co., " "	4,139.64
Oct., "	11/30/23	45	Lancaster Trust Co., " "	4,220.35
Nov., "	12/31/23	1236	Peoples Trust Co., " "	3,003.07
Dec., 1923	1/31/24	1246	" " " " "	1,543.98
Jan., 1924	2/29/24	1268	" " " " "	2,329.58
Feb., "	3/31/24	1285	" " " " "	2,703.84
Mar., "	4/30/24	1296	" " " " "	2,913.42
Apr., "	5/31/24	1317	" " " " "	2,815.95
May, "	6/30/24	1326	" " " " "	2,708.42
June, "	7/31/24	89	Lancaster Trust Co., " "	2,362.21
July 1st and July 2nd	8/30/24	1373	Peoples Trust Co., " "	92.99
Total				82,314.12

SUMMARY

Tax paid at 5% is	$19,752.64
Tax paid at 5% is	82,314.12
Grand total	102,066.76

8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

9. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular No. 136 of the United States Department of Agriculture which contains the following:

57 (Circular No. 136, page 18)

"E. Tea, Coffee and Cacao Products

"c. Cacao Products

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted broken cacao bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose) with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

58 "10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

10. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related subtances," under which classification is included "candy," and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "c. Candy," which is therein defined as "a product made from a sacharine substance or substances."

11. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America, and the only legal standards of purity, classification, and definitions of food products for the United States of America are the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to.

13. The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the
59 excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected as per copies of said notices of rejection hereto attached and marked respectively "Exhibit A" and "Exhibit B," which said exhibits are made a part hereof.

14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

Exhibit A

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Nov. 26, '24.

Address reply to Commissioner of Internal Revenue and refer to MT-ST-CLV. Cls. 332319-324, incl.

KLEIN CHOCOLATE COMPANY,
Elizabethtown, Pa.

GENTLEMEN: Reference is made to claims filed by you for refund of $31,981.65, $34,[illegible].36, $34,[illegible].57, $11,[illegible].78, $35,[illegible].68, and

$1,031.43 representing manufacturer's excise taxes alleged to have been erroneously paid for the period February, 1919, to April, 1924, inclusive.

The claims are based upon the contention that the amounts involved were erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products with respect to which the tax involved was paid were properly taxable as candy under section 900 of the revenue acts of 1918 and 1921.

Your claims are, therefore, rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

EMT

60 *Exhibit B*

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Mar. 3, 1925.

Address reply to Commissioner of Internal Revenue, and refer to
MT:ST:JPM. Cl. 338560

KLEIN CHOCOLATE COMPANY,
Brown Street, Elizabethtown, Pennsylvania.

GENTLEMEN: Reference is made to your claim filed for the refund of $5,161.53, alleged to have been erroneously paid as manufacturer's excise tax for the period May, 1924, to July, 1924.

Your claim is based upon the contention that the amount involved was erroneously collected as tax on sweet milk chocolate.

You are advised that it is held that the products, with respect to which the tax involved was paid, were properly taxable as candy under sections 900 of the revenue acts of 1918 and 1921.

Your claim therefore is rejected in full.

Respectfully,

D. H. BLAIR, *Commissioner.*

VFM

61 Mr. MASON. In order that we will have here for record purposes a reference to the statements under consideration, sir, I will call your honor's attention to the revenue act of 1918, Title IX, section 900, subdivision (9), to be found in 40 Statutes at Large, 1157, page 1122; that section, as it stands, reading "Candy, 5 per cent."

The provision of the revenue act of 1918, under this title, imposing the taxes that were provided for in the various following sections and subsections, reads—as I shall give it to your honor in just a minute—"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which sold or leased," that language being the language with

which Title IX, section 900, starts, subsection (9) of that section providing the percentage for candy as 5 per centum.

In view of the fact that, in addition to the act of 1918, these cases involve the provisions of the act of 1921, we call your honor's attention to certain legislative history of the act of 1921, and we desire to offer in evidence, so that it may be upon the record, even though your honor may take judicial notice, this is to have it available for record purposes, the proceedings of certain hearings before the Senate Finance Committee, engaged in the work of promulgating the act of 1921. We offer in evidence a certified copy of so much of the public hearings before the Senate Finance Committee, held May 9 and May 27, 1921, which relates to the proposed tax on candy, as set forth on pages 697 to 708 of the printed reports of those proceedings, the certificate being made by Elmer W. Pratt, clerk of the Committee on Finance.

Mr. WILSON. What is the purpose of your offer?

Mr. MASON. Counsel for the Government asks us for the purpose of that offer.

The COURT. You did state that.

Mr. MASON. I tried to make clear that the purpose of this offer and the subsequent offers will be to try to establish the legislative history of the act of 1921.

62 The COURT. Surely.

(Paper in question marked "Plaintiff's Exhibit 8.")

Mr. MASON. Your honor will recall that the act of 1918 provided for a tax upon candy. When the act of 1921 was under consideration, as shown by this particular report, there were a number of witnesses who presented to the Senate Finance Committee the scope of the previous enactment and complained of the manner in which that statute had not reached competitive products, and among those who raised the question, that there was a failure by then existing legislation to equalize the taxation, by reason of the fact that certain products were taxed and certain products were not taxed, were the representatives of the National Confectioners Association, called upon to speak for the candy manufacturers, and in the course of their presentation of the problem, which the candy manufacturers had under the then existing act, and in support of a request that there should be an equalization of competitive industries, the candy manufacturers called the attention of the Senate Finance Committee to the fact that sweet chocolate was a product in competition with candy, which was not then subject to taxes.

Your honor will find in the argument not only the general language used to show the manner in which chocolate and other products competed with candy, but you will find the statement made, in the first instance, by Mr. Fuller, and, again, my recollection is, by Mr. Price that under the decision of the United States Court in Massachusetts, it had been decided that the act of 1918, levying a 5 per cent tax upon candy, did not levy a tax of similar amount or any amount

upon sweet chocolate, which was a competitor of candy. That matter is brought to the attention of the Senate Finance Committee in this language. Mr. Fuller, speaking on page 699, says this:

"Many articles made from the same ingredients pay an excise tax when manufactured by candy manufacturers, but no specific taxes
63 when manufactured by other, such as cake and cracker manufacturers. Examples of this are stuffed dates, with which you are familiar, fig-filled Newtons, salted peanuts, chocolate bars, etc.

"The United States District Court of Massachusetts has just held that sweet chocolate bars—not the bitter chocolate used by housewives for cooking—are not subject to the 5 per cent excise tax. These bars are universally sold in direct competition with candy paying the 5 per cent excise tax.

"These are the sort of bars to which I refer [indicating samples] and which you see sold constantly in drug stores and news stands.

"Senator WATSON. Was that question tested in the courts?

"Mr. FULLER. In the United States District Court of Massachusetts, Senator Watson.

"Senator DILLINGHAM. In that popular way they are sold as candy?

"Mr. FULLER. Yes, sir; and they are sold in competition with candies universally. These bars are universally sold, as I have stated, in direct competition with candy which pays the 5 per cent excise tax."

Page 701, Mr. Price speaking also, for the Manufacturers Association, and as president of the National Candy Company, calls the committee's attention to the fact in his words:

"It has been recently held by the Massachusetts courts that a chocolate manufacturer may take a piece of chocolate and put a nut in it and it is a food and not subject to tax. We take a nut and coat it with chocolate and it is subject to tax.

"All of these items come in direct competition with candy."

During the hearings upon the revenue act of 1921, the hearings before the House's Ways and Means Committee afford a part of the legislative history of that act, and we offer so much of the hearings of the Committee on Ways and Means—a report of which is cer-
64 tified to by Clayton F. Moore, clerk of the Committee of Ways and Means—as relates to the subject matter of the inquiry before your honor, and reading from page 252 to page 253 of that report, I call your honor's attention to the fact that before the House's Committee of Ways and Means the representatives of the candy manufactures presented the same request to the House as they presented to the Senate for a protection to the candy manufactures from the competition of products sold in competition with candy, and not bearing a tax, and emphasized the fact to the members of the Ways and Means Committee that chocolate—sweet choc-

olate, in the form sold in competition with candy—did not bear the excise tax. The language that I am reading is the language of Mr. Fuller, beginning on page 252:

"It had been my intention, gentlemen, but circumstances manifestly would not permit that, to erect here before you a counter such as you see in the small neighborhood stores, the general country stores, and the 5 and 10 cent stores, because that is where the great bulk of candy is sold, and I would put in that counter these various pieces of candy, in the form in which they are sold, bulk goods, marked as 120 count goods, three for a penny, two for a penny, and so on.

"Congressman FREAR. You are urging that they be taxed the same as on the candy, as I understand?

"Mr. FULLER. I would say, conversely, Mr. Frear, we are urging that we be not taxed when we are forced to sell our articles in competition with those articles; and I would put in that counter tops, toy balloons, squawkers, marbles, glass agates——

"Mr. FREAR (interposing). Baseballs and bats?

"Mr. FULLER. Yes, sir; and these other things that sell for a penny, or a nickel, or a dime. I wish, gentlemen, we could take a child into a store in your presence and give that child a nickel and you could see the child consume half an hour or an hour of the time of the proprietor of that store shopping. Gentlemen, the child is the champion shopper of the country, and he will determine then whether he is getting a penny's worth or a nickel's worth or a dime's worth of candy, or whether he is going to go out and buy something that is not paying any of these taxes, such as the tops or the squawkers, or the marbles, or these other things."

The COURT. He is not interested in quality, but more in the quantity.

Mr. MASON. The most for the money.

The COURT. Yes; cough drops are very popular.

Mr. Mason:

"I have already referred to the fact that many articles which are manufactured by candy manufacturers pay a tax, while the same articles can be manufactured and sold by bakers and cracker manufacturers without paying a tax. Furthermore, the United States District Court of Massachusetts has just held that the sweet chocolate bars, the small sweet chocolate bars with which you are familiar—are not a candy, and that therefore they are not subject to this 5 per cent manufacturers' tax, and yet they are sold in all these stores, and at news stands, and on the trains, etc., in direct competition with candy.

"Mr. FREAR. Would it help matters if we taxed them?

"Mr. FULLER. It would help matters to this extent, Mr. Frear, it would put everybody on the same competitive level; but it would not be fair for us to come here, I think, and suggest that you tax other items, because of the manifest criticism of an industry.

"Mr. FREAR. That is not the question. We have got to raise the taxes from some source and we want to find out what your recommendations are.

"Mr. YOUNG. Your recommendation is to take it off your product.

"Mr. FULLER. Yes, sir.

"Mr. YOUNG. And if not, then you think it ought to be put on competitive products?

"Mr. FULLER. I do not like to say that, Mr. Young. I would much rather the committee would draw its own conclusions."

(Book in question marked "Plaintiff's Exhibit 9.")

66 Mr. MASON. Following that your honor will take judicial notice of the fact, and from these reports you will see that the committees reported the act of 1921 in a form which should not include a tax upon sweet chocolate or sweet milk chocolate. There was, however, a plan in the act that as reported, as your honor will see from the various Congressional Records of that time, a change in the tax on candy, and a change that provided for a similar graduated tax based upon the price of candy, but referring to the products taxed as candy, and not as sweet chocolate, and not in conjunction with sweet chocolate, nor including sweet chocolate in it, the language being identical with the language of the act of 1918, in so far as that commodity is concerned.

The COURT. What kind of a tax is that?

Mr. MASON. They proposed a graduated tax that would ultimately impose a tax of 10 per cent upon candy selling at a maximum price, but the commodity that was to be taxed was still candy with no additions to that word. There was considerable debate in the House and Senate as to whether or not the candy industry could stand more than the smaller tax, and there was a committee amendment proposed that would change the method of taxing, as originally suggested. That debate extended over some substantial period of time.

I desire to offer from those debates, as part of the legislative history of the act of 1921, so much of the debates as are reported in the Congressional Records for the 67th Congress, first session, as of Tuesday, November 1, 1921, being in volume 61, and to be found on pages 7879, in so far as it relates to the subject matter of this hearing; the volume also carries a number; the volume carries 61, No. 144. The page to which I have reference is 7879, without reading the entire debate, sir. Following the general debate upon the quantum the tax on candy should cover, there was a discussion as to whether or not it covered certain commodities also, and on page 7879, in answer to inquiries made by Senator Reed of Missouri, who is always inquisitive, Senator La Follette stated: "Sweet chocolate is not taxed as candy at all. It is not candy and is not so taxed."

67 "Mr. REED. I thank the Senator. I am perfectly content to have the law stand as it is; but if we are going to vote

on the other proposition, I would like to have it voted on in the manner I have suggested."

I might say, sir, that Senator Reed had suggested an amendment to the committee amendment. Further on, in the same debate and reported on the same page, Senator Willis made this inquiry:

"Mr. President, I desire to ask the Senator from New York a question. I do not desire to be misunderstood in my attitude on this. I am in favor of the reduction of this tax, but what I can not understand is why the Senator's committee now proposes to make a larger comparative reduction in the higher grades of candy than is proposed for the lower and cheaper grades of candy. Why should that be done?

"Mr. CALDER. Mr. President, in the committee I voted for the three per cent tax on all candies. I never agreed that ten per cent was wise, and I do not now, and in line with the statement of the Senator from Massachusetts (Mr. Walsh), in my opinion, it would be inequitable and would work a great hardship on the higher and better grades of candy if the ten per cent tax is levied.

"Mr. MCLEAN. I call the attention of the Senator to the prime reason why those of us who are opposed to that amendment thought we ought not to tax the higher grades of candy. For instance, sweet chocolate is not taxed at all, but it comes in competition with chocolate candy, it answers practically the same purpose, so we felt that it was unfair to tax the chocolate candy and let the sweet chocolate monopolize the market.

"Mr. CALDER. That is another excellent argument.

"Mr. MCLEAN. I think that is the prime reason.

"Mr. REED (from Missouri). Mr. President, it seems to me there is a peculiar dearth of argument here or else a plentitude that is so massive that I can not grasp it. The first appeal was for sweet chocolate for the soldiers who had marched in France some
68 three years ago. That necessity does not exist any more. Now it is discovered that sweet chocolates are not taxed at all.

"Next we heard about the poor clerks and stenographers, who had to make their dinners off of it, and now an appeal that would wring tears from the eyes of a marble statue is made for the poor fellow who has had his whiskey taken away from him and is about to have his candy taxed. What a heart-rending thing it is when one contemplates it! Here is an old jag walking down the street, with his tongue dry, longing for the thing that has passed away apparently forever, who goes into a candy store and buys a pound of candy which costs twenty cents, and which is taxed six mills, and that is to close the curtain on the window of his happiness, and he is to see the sunlight of joy no more. That is a funny argument."

In the course of the Senate hearing, sir, and the House, further debates took place, which we do not need to offer, because the next and substantially the important fact, showing the contentions made

for the reduction of the tax on candy from the proposed tax to the tax, which was subsequently made, of three per cent in 1921, instead of five per cent in the act of 1918, and showing how, as part of the history, that one of the controlling reasons that appears to have influenced the Senators in reducing the tax upon candy, was this contention, that other things did not bear the tax at all.

(The court here announced a recess of ten minutes.)

(The court, at 12.10 o'clock p. m. thereupon reconvened.)

Mr. MASON. Now, sir, we would like to follow the legislative history another step by offering in evidence, certified by the clerk of the Committee on Ways and Means, "Notes on the revenue act of 1918, submitted by the Secretary of the Treasury, without recommendation at this time," is the way in which the pamphlet is entitled.

The COURT. What is it, his message to the Ways and Means Committee?

69 Mr. MASON. His submission to the Ways and Means Committee on November 3, 1919, addressed to the chairman of the Committee on Ways and Means, Honorable Joseph W. Fordney, for the purpose of embracing in the history of the act of 1921 so much of the suggestions which, as the Secretary of the Treasury says, are not at that time recommendations as appear on page 34, in relation to section 900, subsection (9), tax on candy, reading as follows:

"This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.

"It has been suggested that the term 'candy' should be defined.

"The following definition of the term 'candy' is suggested:

"Strike out subdivision (9) and insert:

"Candy, 5 per centum. Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision, pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, sweetened licorice not taxed as cough drops under section 907, sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake, and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, nor glacé or candied fruits purchased for and used in the manufacture of food products, such as ice cream, cakes, and pastries."

(Paper in question marked "Plaintiff's Exhibit 11.")

70 Mr. MASON. Then, we call your honor's attention and suggest the inclusion in the record of the provision of the act of 1921, as passed, Title IX, excise taxes, section 900, reading: "That from and after January 1, 1922, there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold or leased: Subsection VI, candy, 3 per centum."

The COURT. That is the same as the act of 1918?

Mr. MASON. Exactly the same as the act of 1918, without the addition of the suggested definition which Secretary Glass said had been proposed, and without anywhere in the act of 1921 imposing a tax upon sweet chocolate or sweet milk chocolate, or using the general language to include such related subjects in the term of candy or any other taxed substance under the act.

For the purpose of showing the intent of Congress in the use of the word "candy" and as an easy way of bringing previous legislation to your honor's attention, we have prepared here a legislative history beginning with the tariff act of August 10, 1790, showing the use of the words "candy," "chocolate," "sweet chocolate," and "sweet milk chocolate" by Congress; from that time down to the tariff act of September 21, 1922, including not only tariff acts but internal revenue acts, such as the war acts of the 1860's, and one of the later statutes combining the revenue and tariff provisions, and we submit it to your honor in this printed form, and suggest that in that form, for easy reference, it be added to the record. Of course, it is not necessary to offer in evidence acts of Congress, but as it happens to be an easy method of substituting a few pages for many volumes, we suggest that in the printed form, in which it is now presented to the court, that it be added to the record, without being copied by the stenographer. We will furnish sufficient printed copies to take care of the record in each case. I understand that this is not objected to by counsel. It will make it a little bit easier for you.

71 Mr. WILSON. No.

Mr. MASON. In line with the last suggestion, sir, and to make of easy access the content of the standards of purity of food products, which have been offered in evidence in bulk, we have excerpted the relevant parts of the various documents and put them in the same form that we will put the acts of Congress, and we will furnish to your honor, and for record purposes, printed copies of those also. Those show from the various circulars and decisions of the department heretofore offered, the definition and standards of candy and chocolate, sweet chocolate, and sweet milk chocolate in parallel columns, showing the way in which the department has handled it.

Mr. WILSON. Of course, our objection goes as to the materiality of that.

Mr. MASON. It is conceded that any objection that the Government has made to the documents in full would, of course, attach to this excerpted copy from those documents, and which is not intended as additional evidence. It is intended as an easy way of ascertaining what is in the original.

(Two papers in question marked "Plaintiff's Exhibits 12 and 13," respectively.)

Mr. MASON. That is the plaintiff's case in chief, and I may say at this time in view of the fact that it was impossible for counsel for the Government and counsel for the plaintiffs to know just exactly how the case might move as to time, or just how far we would get on to-day, I have agreed with counsel for the Government that the Government witnesses might not be called until to-morrow, and for that reason they may not be here, and if they are not here, with your honor's permission, I will consent to an adjournment of the case until to-morrow morning, so that they may be ready.

Mr. WILSON. If the court please, our witnesses are practically all experts, and if we wanted to call them to-day they would not
72 be ready. Subpœnas have gone out and they will not be here until to-morrow, so, with the permission of the court, we will ask that we adjourn until to-morrow.

The COURT. That is perfectly agreeable to me. Do you think that you will be finished to-morrow?

Mr. WILSON. It will be agreeable for us to start a little earlier.

The COURT. I do not like to burden counsel because frequently you want to take care of your correspondence, but so far as I am concerned nine o'clock is absolutely satisfactory.

Mr. MASON. If it suits my associates, it suits me.

The COURT. If you are all agreed, we will start at nine o'clock.

Mr. MASON. We are quite satisfied here. Your honor asked if the case would be concluded to-morrow. I would be hopeful that it would be. We have a number of witnesses for rebuttal, that we may not be able to put on.

The COURT. I do not believe I will be able to sit on Wednesday. There is just one thing I am expecting, a telephone call that may or may not require me to go back to Easton to-night. If I have to go back to Easton to-night, who shall I notify in that event?

Mr. MASON. If your secretary will notify me, I will notify my associates. I will so arrange that all my associates are notified.

(Adjourned until Tuesday, May 22, 1928, at 9.00 o'clock a. m., daylight saving time.)

Evidence on behalf of defendant

Second day

Philadelphia, Pa., Tuesday, May 22, 1928, at 9.00 o'clock a. m., eastern daylight saving time.

Mr. WILSON. Before opening the defense, your honor, I would like to make a very brief preliminary statement as to the theory on which the defense is proceeding.

73 The COURT. You want this for the record?

Mr. WILSON. Please.

The COURT. All right.

Mr. WILSON. As stated by me yesterday, the Government contends that the Commissioner of Internal Revenue had full power and authority to make his definition of "candy"—that word having been used in the internal revenue acts of 1918 and 1921—providing such definition was reasonable and reasonably applicable to the subject.

At this time I would like to read into the record the definition promulgated by the Commissioner of Internal Revenue, and under which the taxes herein involved were collected. This definition was promulgated originally on May 1, 1919, by the Secretary of the Treasury, and is referred to as Article 22 of the regulations. It originally read as follows:

Mr. MASON. Before you read it, may I ask, for the purpose of the record, whether Mr. Wilson intends to give the basis for that regulation at this time, in view of the fact that in another case the Government did give the basis for it, as the definition suggested by the National Confectioners Association, on behalf of the candy manufacturers, and that was its origin and that was the source from which the Commissioner of Internal Revenue obtained the basis for his definition?

I was wondering if that is to be offered in the record as part of the defendant's case, whether at the same time it ought not to have the history of it and the source of it, but that is for Mr. Wilson.

Mr. WILSON. Of course, the position of the Government in all of these cases is that the origin and the basis of this definition are wholly immaterial in these cases. We are proceeding on the theory that it is a legal, reasonable and just regulation, promulgated under the authority duly vested in the Commissioner of Internal Revenue, and that the definition, as originally worded, and as amended, is all we are interested in at this time.

The definition reads as follows, or read as follows:

74 "Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits, and nuts, glace or candied fruits and nuts, pop corn and other cereals and cereal products mixed or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops, and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, and all similar articles however designated. It does not, however, include cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.

If a manufacturer of glace or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon, or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer, and on which he has performed no further process of manufacture, the tax attaches only to such portions of the goods sold as have been manufactured by him."

On May 10, 1919——

The COURT. What was the date of the definition?

Mr. WILSON. The original definition was May 1, 1919. That is promulgated as article No.—I believe that will be article 22 under the regulation 45.

Mr. MASON. Forty-seven.

Mr. WILSON. On May 10, 1919, there was a ruling made by the commissioner, which I shall read. It is very brief.

75 "Sweet chocolate sold in parcels of such a size and shape that it is commonly purchased and consumed as candy by the general public, is taxable as candy, but sweet chocolate sold in large packages, not as candy, but intended for further manufacturing purposes, is not taxable, provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes."

Now article 22 was revised in December, 1920, to the extent that while still covering permanently sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, by the introduction of another paragraph excluded—

"Sweet chocolate, glace or candied fruits or nuts sold by the manufacturer used under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold."

So that the addition to or the amendment of the original definition did not affect sweet chocolate and sweet milk chocolate, except as to the forms sold where further manufacture was necessary or done.

Mr. MASON. Mr. Wilson, may I ask whether you are offering the ruling of the commissioner, as of May 10, 1919, as a regulation authorized by the statute?

Mr. WILSON. In answer to the inquiry of counsel, with regard to the ruling of May 10, 1919, which I quoted——

The COURT. What was the inquiry?

Mr. MASON. I inquired as to whether or not Mr. Wilson was offering the ruling of the Commissioner of Internal Revenue of May 10, 1919, as an authorized ruling of the Treasury Department, or as

a mere interpretative opinion of the commissioner. If it is offered as 1st, then I want to object because it is not an authorized ruling of the Secretary, and if the second, I will object to it because it has not the weight of the commissioner's opinion.

Mr. WILSON. It will be offered under the second designation of counsel. In other words, what we offer is an office ruling.

76 Mr. MASON. My reason for making that distinction at this time is because the act of 1918, section 1009, and the act of 1921, section 1308 gave, in these words, the only power that the department had to make regulations "That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act." There is no provision in either act permitting the Commissioner of Internal Revenue or the Secretary of the Treasury to make a definition of an article taxed by Congress.

The COURT. What was the original regulation?

Mr. MASON. The original regulation was section 22 of article 47, under the act of 1918, which was issued by the commissioner with the approval of the Secretary. That was authorized by the Secretary, but there is no foundation in the act for a ruling by the commissioner in the nature of a definition of the word "candy."

Mr. WILSON. Reference was made on several occasions yesterday by counsel, while reading from papers and documents introduced in evidence by him, to a certain case in Massachusetts, in which a decision for the plaintiff company had been entered shortly prior to the discussions which were taking place in the House and the Senate relative to this particular measure. The following remarks will be off the record.

[Remarks off the record.]

If your honor please, the proof to be offered by these witnesses will be in a limited field. Under the theory in which the defense is proceeding in these cases, we expect to offer proof showing how the products of these companies are purchased from factories, how they are handled through the wholesale confectioners, and from them to the retail confectioners, and from them sold to the consumer. That is all the proof that we are going to have. We are contending that these products are candies, and we are going to offer proof to the effect that they are handled in conjunction with other candies, handled as candies and considered as such by the trade and by the consumer.

77 The COURT. They are sold in candy stores and by candy sellers.

Mr. WILSON. Surely.

Mr. MASON. Of course, the proof as to the physical acts of manufacture, and packing and the identity of the individuals to whom sold could not be objectionable at all. We do object, however, to any proof from witnesses in an effort to establish that sweet chocolate and sweet milk chocolate are sold as candy, or with candy, or to

persons also buying candy, because, to my mind that is totally irrelevant to the issue which is here. The issue, which is here, is whether or not when Congress used the word "candy" that "candy" extended to include a totally different, well known and highly defined article such as sweet chocolate, and that any evidence of the nature outlined by the offer of proof would be merely evidence of persons who would prescribe facts going to show what has been outlined, and, if shown, would be of no aid to the court, and certainly of no effect as a fact on which to found a judgment of sweet milk chocolate as candy.

The COURT. Are you going to offer evidence to show what the composition of this chocolate is?

Mr. WILSON. If the court please, that is a matter entirely within the knowledge of the plaintiff, and the Government has not had the products analyzed. We can say that we know just in a general way, of course, but as to the exact percentages we can not say at this time.

Mr. MASON. Our thought has been and would be, sir, that the varying quality of products would also be immaterial if the Government were to offer it.

The COURT. I merely inquired whether the proof——

Mr. MASON. I am just carrying the thought, until the product is changed and it is no longer just sweet chocolate or sweet milk chocolate. The Government has admitted that articles taxed and on which the tax was paid, for which these suits have been brought to recover what has been paid, are either sweet chocolate or sweet milk chocolate, and going back to the facts, that are already
78 of record here, we have a well-known article, sweet chocolate, a well-known article, sweet milk chocolate, both of which have received a classification, identification, and definition by the authorized arm of the Government through the Secretary of Agriculture and through Congress itself in its legislative history of the tariff and referred to in the acts going all the way through from the year 1790. Therefore, it is our thought, sir, that such evidence as the Government has indicated it desires to offer from these witnesses, would be interesting, but not relevant to the issue that is here.

Mr. WILSON. If the court please, counsel's statement made a moment ago to the effect that the Government admits—to the effect, at least, that the products manufactured by these companies were sweet chocolate or sweet milk chocolate is true to this extent: The allegations of the various statements of claims in these cases allege that the plaintiffs during certain periods of time manufactured and sold certain sweet chocolate and sweet milk chocolate in various forms and sizes. Now, a chocolate cream is a form of sweet milk chocolate, if you want to call it that.

Mr. MASON. Oh, no.

Mr. WILSON. Of course, we have no evidence here. The plaintiffs have taken upon themselves the assumption of the obligation of any

testimony. So far as we know, up to the present moment, these products were sweet chocolate and sweet milk chocolate in different forms and sizes. That is all we know about it. So, when you attempt to talk of sweet chocolate or sweet milk chocolate as referred to by the Department of Agriculture, where the Department of Agriculture was talking about the purity that a certain product had, so far as the quality was concerned to pass the pure food law, you are talking about an entirely different subject than we are. We are interested in a product that is made up of chocolate, sugar, and flavored in some instances with nuts, a finished product, as distinguished from the raw product, which is ground from the cacao bean. If so, we should not admit that the products here involved are sweet chocolate and sweet milk chocolate as referred to by the Department of Agriculture, because they are not.

The COURT. Really, the purpose of your offer is as to the form in which they are sold, and the places in which they are sold, and so on?

Mr. WILSON. Our theory is that these products, as manufactured, since they contain a special percentage of flavor, of nuts and cream, and whatever is put in them, and since they are sold to the candy trade, to the wholesalers, and sold by them to the retailers, and the consumers, they are within the meaning of the act of 1921 where the term "candy" is used.

The COURT. On that theory, leaving out any question of the regulations of either of the departments, if some product contained a sugar, nothing but sugar, made up in the exact form, and was sold to the candy dealers, sold as candy, on that theory that could be developed to show it was candy.

Mr. WILSON. I do not understand your statement. I am sorry.

The COURT. My thought, following that line and leaving out of consideration all of these regulations—suppose there were no regulations at all, and the question was whether sugar came under the head of "candy" at all, just plain candy, and you would offer to prove that ordinary sugar lumps, made up in attractive form, animals, or something of that sort, and sold in candy stores, it would be candy within the meaning of that act.

Mr. WILSON. I would say, in answer to your honor, if ordinary squares of sugar, for instance, Domino sugar were dolled up and fixed up in some attractive package, with labels on them, which would be appropriate to a confection in which sugar was carried, and sold in competition with, but also as candy, I would say they were also within the meaning of the act.

(Recess was here taken until 10.15 o'clock a. m.)

LOUIS NEWHOFF, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. Where do you reside? Where do you live?

A. 1826 South Broad Street.

Q. In Philadelphia?
A. In Philadelphia.
Q. In what business are you engaged?
A. Confectionery.
Q. Confectionery?
A. Yes.
Q. And where is your place of business?
A. 255 Market Street.

Mr. MASON. Mr. Wilson, do I understand that Mr. Newhoff has been called for all four cases?

Mr. WILSON. For the Hershey case.

By Mr. WILSON:

Q. How long have you been engaged in the confectionery business?
A. About thirty-two years.
Q. And what portion of that time have you been here; all the time?
A. In that section, about seven years.
Q. Seven years?
A. That's where I am located now.
Q. I mean in Philadelphia.
A. In Philadelphia all the time.
Q. Do you handle any of the products manufactured by the Hershey Chocolate Company of Hershey, Pennsylvania?
A. Yes, sir.
Q. For how long a time have you handled those products?
A. Since I have—well, it would be about the same time, I believe; something about twenty-five or thirty years, between that time, because when I started in business, Hershey wasn't in the chocolate business then; just about twenty-five or twenty-seven years, something like that.
Q. What of the Hershey products do your carry?
A. We carry practically the complete line.

81 Q. And what, so far as you can recall now, are the names of some of their products?

A. Well, they are making milk chocolate, making chocolate almond bars, and different other items, but they are all chocolate goods.
Q. They are all chocolate goods?
A. They are all chocolate goods.
Q. You have said that you are in the confectionery business?
A. Yes, sir.
Q. What trade do you supply?
A. We supply the candy stores and drug stores.
Q. Candy and drug stores, generally?
A. Yes, and probably the grocery stores. You know, they are handling the goods.
Q. You supply those lines of business with the Hershey products, do you?

A. I do.
Q. Where do you buy the Hershey products?
A. I get them direct from Hershey.
Q. From the factory?
A. From the factory.
Q. How are those products handled by you?
A. Well, as chocolate.
Q. As chocolate?
A. Right.
Q. Your place is advertised as what?
A. As a confectionery.
Q. You handle that stuff as chocolate confectionery, do you?
A. We handle the confectionery line, but there are different varieties in confectionery, but anybody can come in and ask for the particular item. For instance, if they ask for chocolate, I am going to give them chocolate.
Q. Your line, however, is limited to confectionery of all kinds?
A. Of all kinds.
Q. You supply the confectionery trade?
82 A. Exactly.
Q. Do you know, of your own knowledge, whether wholesale confectioners in this community, generally, handle Hershey products? Do you know, of your own knowledge, whether they do?
A. Why, naturally. I believe the majority of jobbers in the confectionery line handle Hershey goods. It is a very prominent item.
Q. You know a great many who do?
A. Sure.
Q. And those products are handled by those men in the confectionery department in the confectionery field?
A. Yes, sir.

Cross examination by Mr. MASON:

Q. Do you handle nuts of any kind? Do you handle salted nuts?
A. We do.
Q. And do you handle salted peanuts?
A. We do.
Q. Salted almonds?
A. Not exactly. The most we do handle are salted peanuts.
Q. And those are handled in the confectionery trade?
A. Some will handle them, and some will not handle them.
Q. You, yourself, do handle them?
A. I do.
Q. Do you handle dates?
A. No; we do not.
Q. Do you handle stuffed dates of any kind?
A. Sometimes, but not all the time. I don't consider it as an item.
Q. Do you handle prunes of any kind?
A. We do sometimes.

Q. Do you handle candied fruit of any kind?

A. What do you mean by "candied fruit"?

Q. What kind of candied fruit do you handle?

83 A. We would say, "candy fills." That would be different kinds of fruit. We do handle them.

Q. Do you handle raisins of any kind?

A. We do.

Q. There is quite a large demand for raisins in the confectionery trade, is there not?

A. Well, it is quite a seller.

Q. And raisins are put up in small boxes, and they are eaten by various people who buy them in the boxes, are they not?

A. Yes, sir.

Q. Do you handle what are called "chocolate covered crackers"—the various confections that are put out by the bakers?

A. Yes, sir; I do.

Q. Those small cakes——

A. Yes; they are put in five-cent packages, chocolate coated; yes, sir.

Q. I am wondering if you also handle those various small toys, balloons, nicknacks of that sort?

A. Well, that is no item; just——

Q. Just a side line?

A. Just on the side.

Q. But you sell them to the confectionery trade, do you not?

A. Oh, yes. I don't know who is buying them, whether it is confectioners or retailers.

Q. The small stores?

A. Yes, sir.

By the Court:

Q. That is, you sell them?

A. We do.

By Mr. Mason:

Q. Mr. Wilson asked you whether the wholesale confectioners handled Hershey's sweet chocolate and sweet milk chocolate.

A. Yes, sir; they do; oh, yes.

84 Q. The tobacco stores also handle Hershey's products, do they not?

A. Yes; they do.

Q. And the wholesale drug jobbers handle Hershey products?

A. Yes; they do.

Q. And the wholesale grocery jobbers handle Hershey products, do they not?

A. Yes, sir.

Q. And what they handle and what you handle are Hershey's sweet chocolate and sweet milk chocolate?

A. Exactly.

Redirect examination by Mr. WILSON:

Q. Your main lines in your store are candies; that is what you mean?

A. Why, the general line.

Q. You are in the candy business, the wholesale business?

A. The wholesale business.

Mr. WILSON. I want to pursue the same line of examination in regard to the Wilbur products.

Mr. MASON. I understand the witness is now being examined in the Wilbur cases. Do you agree, Mr. Wilson, that this testimony will apply to all of the cases?

Mr. WILSON. All right, that will be very agreeable.

Mr. MASON. It is agreed by counsel for the plaintiffs and counsel for the Government that the testimony just given by the witness in relation to the Hershey cases shall apply to the other three plaintiffs, and that it is to be assumed that it would be the same in relation to the sweet chocolate and sweet milk chocolate manufactured and sold by the other three plaintiffs as it has been in relation to the Hershey sweet chocolate and sweet milk chocolate, and that his cross-examination and his answers therein would be the same.

Mr. WILSON. That is all, Mr. Newhoff.

85 ALBERT SCHNEIDER, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. You reside in Philadelphia?

A. I do.

Q. How long have you lived here?

A. All my life.

Q. In what business are you engaged?

A. I am a foreman for the S. S. Kresge Company, 931 Market Street.

Q. Of the Kresge Company?

A. Yes, sir.

Q. How long have you been with that company?

A. I have been with that company eight years.

Q. I will ask you, approximately how many stores are there in the United States operated in this same chain of the Kresge Company?

A. Between 450 and 500, and they are scattered.

Q. Throughout the United States, generally?

A. All throughout the United States.

Q. The same method of classifying goods, and carrying goods, and buying and selling is employed in all those stores, is it not?

A. Yes, sir; it is.

Q. The same system prevails? Now, with regard to the particular store with which you are connected here in Philadelphia, does that store carry any products of the Hershey Chocolate Company of Hershey, Pennsylvania?

A. They carry Hershey's almond bars and milk chocolate bars only.

Q. Just those two products?

A. Yes.

Q. How long have they carried them?

A. As far as I can remember, I have always seen them on our counters.

Q. At any rate, for several years?

A. Yes.

Q. In what department are those goods carried?

86 A. In our candy department.

Q. Do you know, of your own knowledge, that they are carried in the candy department here in this store, with which you are connected?

A. Yes, sir.

Q. How are those goods carried in the other Kresge stores?

Mr. MASON. If you know?

A. The same way. They have got to be.

By Mr. WILSON:

Q. You know that, of your own knowledge, the candy department in the Kresge stores is a separate and distinct department?

A. Yes, sir.

Q. From what place do you buy the Hershey products?

A. We buy them through the Chocolate Sales Corporation of Hershey.

Q. Buy them from Hershey?

A. Yes, sir.

Q. And you sell them to the consumer; that is, the retail trade?

A. The retail trade. We sell right to the customer.

Cross-examination by Mr. MASON:

Q. As I understand it, the Kresge stores have what you call a candy counter or department?

A. Yes, sir.

Q. And what do you sell there?

A. We sell candy, cakes, toy novelties; a hundred different things.

Q. Sweet chocolate?

A. Yes; we sell sweet chocolate; chocolate covered.

Q. And do you sell bitter chocolate?

A. Well, we sell a line from Hershey, which is called the "Cloverdale" chocolate. It is a block chocolate.

By the COURT:

Q. What is the "Cloverdale"? Is that a bitter chocolate?

87 A. No; that's a sweet milk chocolate, the same as the almond bar; only a large cake without nuts.

By Mr. MASON:

Q. The only difference between the sweet chocolate and the almond bar is that the almond bar has a few almonds in it?

A. Yes, sir; that's it.

Q. Will you tell me whether you sell any other sweet chocolate or sweet milk chocolate than Hershey's?

A. Only Hershey's. We carried Klein's until here recently, and we now carry Hershey's exclusively.

Q. In addition to the candy, and the sweet milk chocolate and the cakes that you sell over the candy counter, do you sell chewing gum?

A. Yes, sir.

Q. Do you sell stuffed dates?

A. No; we don't carry those.

Q. Do you sell prunes?

A. No, sir.

Q. Do you sell raisins?

A. In boxes, small boxes.

Q. And those boxes are the small five-cent boxes and the ten-cent boxes, that are put up for consumption by the purchaser?

A. Yes, sir.

Q. And after you open up the box, you find in it the raisins; and you sell, also, salted nuts?

A. Yes, sir; peanuts.

Q. Do you sell only salted peanuts, or a mixture of peanuts, or things of that sort, salted nuts?

A. We sell peanuts, two or three different kinds, and almonds, and things like that; loose salted.

Q. Where do you sell your fruits? In what part of the store do you sell your fruits? Do you sell those at the candy counter?

A. We don't sell fruits. Fruits come under a separate department if we carry such; see?

Q. Do you sell any kind of candied fruits at the candy department?

88 A. Well, if you want to call the orange slices candied fruit, you could call it.

Q. What would you call it? It is a candy?

A. It is the slices only; just with the orange flavor.

Q. Not the solid orange?

A. No.

Q. At the candy counter do you sell at various seasons for various occasions, the holiday trade and St. Patrick's trade, little favors, which are made up to put on a table to decorate a table?

A. No; that is sold—it comes under the stationery department.

Q. What can you say about the other things that you sell at the candy department, besides the things that you have indicated?

A. Well, there's glass novelties filled with candy and such.

Q. Those are sold empty and otherwise?

A. No; mostly all filled. That glass comes with the candy when it is sold.

Q. That is to say, a glass bird or a glass elephant when it is filled with candy becomes candy in the eyes of your department?

A. That's the way it comes to our stores.

Q. It would be rather unfortunate for the person who ate the filling to try and eat the glass containing the candy; would it not?

A. It sure would.

Q. Did you say you also sold toys at the candy department?

A. That's it. We call them "candy toys." Those are bought through our main office in Detroit, our buyer. We have no jurisdiction over it. We have to take what he sends us.

Q. In addition to the candy toys, do you have the paper maché toys as well?

A. No, sir.

Q. Only the glass toys?

A. Yes.

The COURT. Did he sell Klein's some time ago?

89 Mr. MASON. Yes; as I understand it, he sold it until some time ago.

Mr. WILSON. I think this testimony should apply to the Hersney and the Klein cases.

Mr. MASON. That is agreed to.

ISRAEL MARGOLIS, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. You are a resident of Philadelphia?

A. Yes, sir.

Q. Are you in business here?

A. In business in Philadelphia; yes, sir.

Q. And what is the name of your business?

A. We are operating under the name of "Candy Headquarters."

Q. Where is your store?

A. 117 Market Street.

Q. Are you in the wholesale business or retail business, or both?

A. Both.

Q. How long have you been engaged in that business here in Philadelphia?

A. Well, about thirteen or fourteen years.

Q. In Philadelphia?

A. In Philadelphia, in that business.

Q. Does your company carry any of the chocolate products manufactured by the Hershey Company at Hershey, Pennsylvania?

A. Yes, sir.

Q. Can you tell us the names of some of those products?

A. Hershey milk chocolates, Hershey almond bars, Hershey milk chocolate kisses.

Q. Do you carry the bars in different sizes?

A. Five and ten cent, and half pound cakes.

Q. And how long have you carried those products?

A. Ever since I have been selling candy; that's twelve or thirteen years.

Q. And do you sell anything other than candy?

90 A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. What other things do you sell other than candy?

A. We sell tobacco, ice cream supplies, fountain supplies, and sell novelties.

Q. From whom do you buy your Hershey products?

A. From the Chocolate Sales Corporation of Hershey, Pa.

Q. You buy direct from the manufacturer?

A. Direct from the manufacturer; yes, sir.

Q. How are those products handled by you; as what?

A. As chocolate; sold as chocolate.

Q. Your tobacco and your subitems that you mentioned a moment ago, do you handle those wholesale, or retail, or both?

A. Wholesale only.

Q. And you handle candy?

A. Yes, sir.

Q. And included in that is chocolate candy?

A. Yes, sir.

Q. Who do you supply?

A. Well, jobbers, cigar stores, drug stores, groceries, stands—outside stands and indoor stands.

Q. Candy stores?

A. Candy stores; yes, sir.

Q. You do not handle any groceries, do you?

A. No, sir.

Q. You say the name of your place is the "Candy Headquarters"?

A. "Candy Headquarters"; yes, sir.

Q. And in addition to candy, you handle tobacco and sell other supplies?

A. Yes, sir.

Cross-examination by Mr. MASON:

Q. As I understand it, your business is jobbing various small articles, is it not?

91 A. Yes, sir.

Q. And you have told us that you handle tobacco goods?

A. Yes, sir.

Q. Does that mean cigarettes and chewing tobacco?

A. Cigars, cigarettes, and smoking tobacco.

Q. Do you handle chocolate and raisins?

A. Yes, sir.

Q. That is, sweet chocolate and sweet milk chocolate?

A. Yes, sir.

Q. And you sell chocolate almond bars?

A. Yes, sir.

Q. The almond bars that you handle are the same as the sweet milk chocolate, except they have a few almonds in them?

A. A few almonds in them.

Q. You handle, I think you said, certain small articles for the drug stores?

A. Not drug supplies.

Q. You handle cough drops, do you not?

A. Cough drops; yes, sir.

Q. You handle certain soda supplies?

A. Yes, sir.

Q. You handle mint of various kinds?

A. Yes, sir.

Q. And you handle candies?

A. Yes, sir.

Q. And you handle chewing gum?

A. Yes, sir.

Q. And you handle stuffed dates, do you?

A. Chocolate coated dates.

Q. And you handle salted nuts of all kinds?

A. Salted nuts; yes, sir.

Q. What kind of small toys do you handle?

A. We handle balloons, we handle rubber balls; like clay pipes, and sell trinkets.

Q. All kinds of trinkets of that sort. As a matter of fact, you might say it would cover all the articles that would be available in the five and ten cent trade, would it not; a large part of it?

92 A. Penny, five and ten cent trade; yes, sir.

Q. And in the five and ten cent trade you include the raisins that have been spoken of here; that is, the small boxes of raisins?

A. Yes, sir; we handle them.

Q. I wonder do you handle the small cakes, confections of that sort?

A. We handle peanut butter sandwiches, cheese sandwiches, fig sandwiches, in five cent packages.

Q. Do you handle these small cakes that are covered with chocolate?

A. Yes, sir; we handle those.

Q. All things of that kind?

A. Yes, sir.

By the Court:

Q. Eskimo pie?

A. Eskimo pie; no, sir; that's not chocolate, that's ice cream.

Redirect examination by Mr. Wilson:

Q. In your store, the candies, the greater part are on the shelves, aganist the wall, in boxes of different kinds, or where do you keep them?

A. On the shelves.

Q. The Hershey stuff and all the other candies belong on the same shelf, together?

A. Together.

Recross-examination by Mr. MASON:

Q. Wait just a minute, because Mr. Wilson is testifying. As I understand it, you have your various goods divided up into departments, so that you will know what you have got in stock, have you not? You do not have them——

A. Pardon me, do you want me to explain?

Q. Yes.

93 A. I wouldn't place a box of cigars with a box of chocolate in the one bin.

Q. Certainly not.

A. But it is only one store.

Q. But what you do is to separate, in a general way, the various articles that you have there, so that you will know what you have there?

A. Yes.

Q. And in one place you keep your sweet chocolate and your sweet milk chocolate, and in another place you keep your raisins, and in another place you keep your tobacco, and in another place you keep your hard candies, and your various kinds of candies?

A. Sure.

Q. That is all separated in a proper way?

A. So we will know where to lay our hands on it.

Q. Do you handle Klein's?

A. Klein's chocolate; yes, sir.

Q. Do you handle the York chocolate?

A. No, sir; we don't handle it one time.

Q. You did handle it at one time?

A. As far as I can remember, I don't think we did.

Mr. MASON. Then, it is agreed that the testimony of Mr. Margolis will be taken to apply to the Wilbur cases, and the Klein cases, with the same force and effect as it applies to the Hershey cases.

Mr. WILSON. If the court please, that is all the testimony from the defense at this time.

The defendant rests, your honor.

Mr. MASON. If your honor please, the plaintiffs will also rest, so that the record is now complete for your honor.

(Argument set for Thursday, June 7, 1928, at 10.00 o'clock a. m., daylight saving time.)

And thereafter counsel for the plaintiff and counsel for the defendant respectively made requests of the said court for findings of fact and conclusions of law; which requests for findings of fact and conclusions of law respectively were as follows:

94 *Plaintiff's request for findings of fact and conclusions of law*

[Title omitted.]

FINDINGS OF FACT

The plaintiff, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this

case in the findings of fact, requests the court to find the same as follows:

1. The plaintiff is a corporation, duly organized and existing under the laws of Pennsylvania, having its principal place of business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the district in which the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.

4. The collector of internal revenue, the defendant above
97 named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), did, for the period aforesaid, assess excise taxes against the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80 and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6), likewise assess excise taxes against the plaintiff aggregating $82,314.12 being 3% of the said sales of $2,743,804 under the guise that sweet chocolate and sweet milk chocolate was "candy."

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of the said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, excise taxes amounting to $102,066.76 more particularly set forth as follows:

Tax for month of—	Date paid	Check No.	On bank	Amount paid
July, 1921	8/30/21	751	Corn Exch. Nat'l, Philadelphia, Pa	$1,618.62
Aug. "	9/29/21	893	People Trust Co., Lanc., Pa	3,660.87
Sept. "	10/31/21	618	" " " "	2,386.16
Oct. "	11/30/21	637	" " " "	3,599.65
Nov. "	12/31/21	31752	Elizabethtown National	4,014.62
Dec. "	1/31/22	32906	"	3,972.72
Total				19,752.64
Jan. 1922	2/28/22	702	Peoples Trust Co., Lanc., Pa	2,099.02
Feb., "	3/31/22	727	" " " "	2,153.40
Mar., "	4/29/22	747	" " " "	1,916.50
Apr., "	5/31/22	788	" " " "	1,447.47
(Special)	6/10/22	797	" " " "	3,242.43
Made up as follows:				
Additional tax				$2,275.23
5% penalty				113.76
Interest to June 20, 1920				174.58
Interest 7/1/20–6/1/22				573.86
				3,242.43
96 May, 1922	6/30/22	806	Peoples Trust Co., Lanc., Pa	1,883.45
June, "	7/31/22	32906	Elizabethtown National	1,814.30
July, "	8/31/22	831	Peoples Trust Co., Lanc., Pa	1,485.56
Aug., "	9/30/22	843	" " " "	2,498.48
Sept., "	10/31/22	874	" " " "	2,853.91
Oct., "	11/29/22	901	" " " "	2,700.93
Nov., "	12/30/22	915	" " " "	2,827.30
Dec., "	1/31/23	940	" " " "	2,049.62
Jan., 1923	2/28/23	960	" " " "	2,868.44
Feb., "	3/31/23	992	" " " "	2,939.08
Mar., "	4/30/23	1032	" " " "	3,192.12
Apr., "	5/31/23	1056	" " " "	2,681.19
May, "	6/30/23	1081	" " " "	2,889.43
June, "	7/31/23	1112	" " " "	2,052.22
July, "	8/31/23	1144	" " " "	2,030.61
Aug., "	9/29/23	26	Lancaster Trust Co., "	3,571.81
Sept., "	10/31/23	1189	Peoples Trust Co., "	4,123.61
Oct., "	11/30/23	45	Lancaster Trust Co., "	4,226.23
Nov., "	12/31/23	1235	Peoples Trust Co., "	2,900.67
Dec., "	1/31/24	1246	" " " "	1,842.68
Jan., 1924	2/29/24	1266	" " " "	1,929.59
Feb., "	3/31/24	1285	" " " "	1,783.64
Mar., "	4/30/24	1298	" " " "	2,913.41
Apr., "	5/31/24	1317	" " " "	2,615.65
May, "	6/30/24	1339	" " " "	2,708.42
June, "	7/31/24	50	Lancaster Trust Co., "	2,362.21
July 1st and July 2d	8/29/24	1373	Peoples Trust Co., "	90.80
Total				82,314.12

SUMMARY

Tax paid at 5% is	$19,752.64
Tax paid at 6% is	82,314.12
Grand total	102,066.76

6. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation of authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the
97 courts of justice. The standards of purity of food products together with their precedent definitions established by the

Secretary of Agriculture, pursuant to such authority are the official definitions and standards of such food products for the United States of America.

7. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular No. 136 of the United States Department of Agriculture which contains the following:

(Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products

"C. Cacao Products

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contain not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fibre, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

98 "5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fibre, or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

"10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber, or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

8. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under
99 which classification is included "candy," and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "C. Candy," which is therein defined as "a produce made from a saccharine substance or substances."

9. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America, and the only legal standards of purity, classification, and definitions of food products for the United States of America are the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to.

10. The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected.

11. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

12. Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

13. Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an
100 identity well known to dealers in and consumers of food products, and to the Congress of the United States.

14. Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product.

15. Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or

flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug.

16. Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy.

17. Sweet chocolate and sweet milk chocolate are not candy.

CONCLUSIONS OF LAW

The plaintiff requests the court to make the following conclusions of law:

1. The revenue act of 1918 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

101 3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921.

4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant.

5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest.

S. V. HOSTERMAN,
WM. CLARKE MASON,
C. J. HEPBURN,
Attorneys for Plaintiff.

102 *Defendant's request for findings of fact and conclusions of law*

[Title omitted.]

FINDINGS OF FACT

The defendant, considering the facts hereinafter set forth to be proven, requests the court to find the same as follows:

I

The plaintiff is a corporation duly organized and existing under the laws of Pennsylvania, having its principal place of business at Elizabethtown, Lancaster County, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

II

The defendant at all the times hereinafter mentioned was the United States collector of internal revenue for the district in which

the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

III

During the months of July, August, September, October, November, and December, 1921, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and
103 sizes having a total selling price of $395,052.80, and during the months of January, 1922, to July, 1924, inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes having a total selling price of $2,743,804.00.

IV

The defendant above named, acting under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9), did, for the period aforesaid, collect excise taxes from the plaintiff aggregating $19,752.64, being 5% of the said sales of $395,052.80, and for the second period above mentioned did by virtue of the revenue act of 1921, Title IX, section 900 (subdivision 6), likewise collect excise taxes from the plaintiff aggregating $82,314.12, being 3% of the said sales of $2,743,804.00.

V

The plaintiff in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claim for refund for payment to it of the amounts of the said taxes so paid. The plaintiff filed a claim for refund on June 11th, 1924, and another claim for refund on October 11th, 1924, for the excise taxes paid for the periods hereinbefore mentioned, and these claims for refund were officially rejected.

VI

The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

CONCLUSIONS OF LAW

The defendant requests the court to make the following conclusions of law:
104

I

The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

II

The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

III

The defendant is entitled to judgment.

GEORGE W. COLES,
United States Attorney,
Attorney for Defendant.

105 And thereafter, to wit, on November 22, 1928, the said court filed an opinion embodying findings of fact and conclusions of law which follows (in the form revised by the court as indicated by the opinion of January 17, 1929), viz:

Opinion of the court

Filed Nov. 22, 1928

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania.

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected as typical for an opinion.

The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid
106 upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissionar of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read. "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds,"
107 "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy; that is, eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon

the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1909 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument, based upon legislative history, applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under the act. The situation at the time of the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the treasury department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court
108 for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here.

There have been called to the attention of the court thirty-two
109 statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years,

all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, "to sugar candy," "all confectionery not specially provided for in this section" and "Unsweetened chocolate and cocoa prepared and manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 162, and other cases.

These decisions announce a well established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 356; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 182 U. S. 655.

Concluding therefore that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved can not be discarded but

must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485. A corollary to the general principle just stated is the
111 presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's Interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various Acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F–80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

112 Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore not open to

construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the first Circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is
113 ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely described an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy

could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

114 To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

Simultaneously with the filing of the foregoing opinion and findings and conclusions the said court filed special findings and conclusions on the requests for findings of fact and conclusions of law as follows, viz:

115 *Findings of facts*

[Title omitted.]

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June Term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

CONCLUSIONS OF LAW

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the court:

W. H. KIRKPATRICK, *J.*

116 Upon motion of counsel for plaintiff the court thereafter ordered a reargument of the questions involved, which was had on December 4, 1928, and thereafter on January 17, 1929, the court filed the following opinion modifying and reaffirming the findings and conclusions heretofore made, viz:

Opinion sur reargument

Filed January 17, 1929

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above-entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected.

On page 4 the court in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

117 The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

II

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases.

"In addition thereto, the statements of facts contained in the opinion of the Court filed in the case of Blakely D. McCaughn, Number 12360, June Term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are: First, that the above manner of finding facts is not proper practice, and second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge, and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of

118 proper practice in stating the fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber

the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klien and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect
119 of the opinion in that case to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all. The act there under consideration was a special act allowing a suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages," which the act authorized the court to find, included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy," however, we have just the opposite situation.

Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co. #94, October Term, 1928) the general rule referred to is reaffirmed. The court said "Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression, or absurdity, United States v. Goldenberg, 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in
120 other acts of Congress. The matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the latter considerations were the more important and controlling ones. The conclusions reached in the opinion filed will not be changed.

By the court:

W. H. KIRKPATRICK, *J.*

And thereupon counsel for the said plaintiff did then and there except as set forth in the notes of the trial before the said court without a jury, and did then and there except to the findings of fact and conclusions of law made by the said court as follows, viz:

Plaintiff's Exceptions

A. EXCEPTIONS TO THE FINDINGS IN THE OPINIONS OF THE COURT

1. The plaintiff excepts to the following finding in the revised opinion of the court:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The plaintiff excepts to the following finding in the revised opinion of the court:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with
121 establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The plaintiff excepts to the following finding in the revised opinion of the court:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The plaintiff excepts to the following finding in the revised opinion of the court.

"Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined."

5. The plaintiff excepts to the following finding in the revised opinion of the court:

"It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The plaintiff excepts to the following finding in the revised opinion of the court:

"When we examine the revenue acts of 1918 and 1921, it
122 becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The plaintiff excepts to the following finding in the revised opinion of the court:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The plaintiff excepts to the following finding in the revised opinion of the court:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The plaintiff excepts to the following finding in the revised opinion of the court:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold."

10. The plaintiff excepts to the following finding in the revised opinion of the court:

"To sum up the whole problem, we have here on the one
123 hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite directions, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The plaintiff excepts to the following finding in the revised opinion of the court:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit, passing upon the same question under the act of 1918, decided that sweet chocolate was properly taxable as candy."

12. The plaintiff excepts to the following finding in the revised opinion of the court:

"In view of what has been said the decision is reached that the collection of the tax was lawful."

13. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15. Oct. T., 1928, U. S. Supreme Court), to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in
its ordinary sense, its general popular meaning will be the
124 most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

14. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15. Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

B. EXCEPTIONS TO THE DENIAL OF PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT.

1. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

2. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

3. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding
125 cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished products."

4. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, tale, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

5. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, Chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

6. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

C. EXCEPTIONS TO THE DENIAL OF THE PLAINTIFF'S REQUEST FOR CONCLUSIONS OF LAW

1. The plaintiff excepts to the refusal of the court to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

126 2. The plaintiff excepts to the refusal of the court to affirm the plaintiff's second request for conclusion of law:

"2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

3. The plaintiff excepts to the refusal of the court to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921."

which was denied by the court.

4. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

which was denied by the court.

5. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest."

which was denied by the court.

D. EXCEPTIONS TO THE COURT'S CONCLUSION OF LAW

1. The plaintiff excepts to the court's conclusion of law as follows:

127 "1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid are candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

2. The plaintiff excepts to the court's conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

3. The plaintiff excepts to the court's conclusion of law as follows:

"3. The defendant is entitled to judgment."

And inasmuch as the said testimony, opinions, findings, and conclusions, so excepted to, do not fully appear upon the record, the said counsel for the plaintiff did then and there tender this bill of exceptions as aforesaid and requested the seal of the judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the plaintiff did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 26 day of January, 1929.

W. H. KIRKPATRICK, *J.* [L. S.]

PHILADELPHIA, PA., *January 26th, 1929.*

I hereby approve the above bill of exceptions as to form and agree that the same may be settled by the court, and I hereby accept service of notice of settlement thereof in accordance with the ruling of the court.

GROVER W. COLES,
United States Attorney for Defendant.

128 In United States District Court

[Title omitted.]

Præcipe to enter judgment

Filed April 22, 1929

To the Clerk U. S. D. C. E. D. of Pa.:

Enter judgment in the above-entitled case in favor of the defendant and against the plaintiff in accordance with the revised opinion of the court filed January 22, 1929.

GEORGE W. COLES,
United States Attorney.

129 In United States District Court

KLEIN CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE.

Judgment

Filed April 22, 1929.

Before KIRKPATRICK, *J.*

And Now, April 22nd, 1929, in accordance with the revised opinion of the court filed January 22nd, 1929, and by præcipe filed, judgment in the above entitled case is hereby entered in favor of the defendant and against the plaintiff, Klein Chocolate Company.

BY THE COURT.

Attest:

E. G. JOHNSON, *Deputy clerk.*

130 In United States District Court

[Title omitted.]

Assignments of error

Filed May 17, 1929.

Comes now the above named plaintiff, the appellant herein, by its attorneys of record, and assigns as errors upon which it will rely, the following errors as having intervened in the record, proceedings and judgment of the United States District Court for the Eastern District of Pennsylvania in the above entitled cause, to wit:

1. The learned court below erred in the following finding in the revised opinion:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Sec-

retary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The learned court below erred in the following finding in the revised opinion:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years
131 later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The learned court below erred in the following finding in the revised opinion:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The learned court below erred in the following finding in the revised opinion:

"Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined."

5. The learned court below erred in the following finding in the revised opinion:

"It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's product in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The learned court below erred in the following finding in the revised opinion:

"When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise fea-
132 tures of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The learned court below erred in the following finding in the revised opinion:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The learned court below erred in the following finding in the revised opinion:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The learned court below erred in the following finding in the revised opinion:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold."

10. The learned court below erred in the following finding in the revised opinion:

"To sum up the whole problem, we have here on the one hand a pretty well-defined popular usage of the term candy which 138 includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The learned court below erred in the folowing findings in the revised opinion:

"But in Malloy v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy."

12. The learned court below erred in the following finding in the revised opinion:

"In view of what has been said the decision is reached that the collection of the tax was lawful.

13. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15.—Oct. T., 1928, U. S. Supreme Court), to abrogate the well-established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature in

tended the word to signify. In fact, I do not think that the case cited touches that rule at all."

134 14. The learned court below erred in the following finding in the opinion filed January 17, 1920, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15—Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

15. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1913, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

16. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

17. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

Sweet chocolate is chocolate mixed with sugar (sucrose), with

135 or without the addition of cocoa butter, spices or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

18. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

19. The learned court below erred in denying the plaintiff's requestd for finding of fact as requested, viz:

"Since the act of May 2, 1792, Stat. L. 250, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy.

20. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy.

21. The learned court below erred in refusing to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

22. The learned court below erred in refusing to affirm the plaintiff's second request for conclusion of law:

136 "2. The revenue act of 1921, did not levy a tax upon sales of sweet chocolate or milk chocolate, eo nomine."

23. The learned court below erred in refusing to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921."

24. The learned court below erred in refusing to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

25. The learned court below erred in refusing to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in th statement of claim with interest."

26. The learned court below erred in its conclusion of law as follows:

"1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

27. The learned court below erred in its conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

137 28. The learned court below erred in its conclusion of law as follows:

"3. The defendant is entitled to judgment."

29. The learned court below erred in entering judgment against the plaintiff and in favor of the defendant.

Wherefore appellant prays that the judgment entered in said cause in the said District Court for the Eastern District of Pennsylvania may be reversed and the said cause remanded.

S. V. Hoffman,
Wm. Clarke Mason,
C. J. Hepburn,
Attorneys for Plaintiff.

188 In United States District Court

[Title omitted.]

Petition for Appeal

Filed May 17, 1929.

To the Honorable W. H. KIRKPATRICK, *District Judge:*

The above named plaintiff, Klein Chocolate Company, feeling aggrieved by the judgment rendered and entered in the above entitled cause on the 22nd day of April, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignments of error filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings, and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it to perfect its appeal, be made.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

KLEIN CHOCOLATE COMPANY,

By S. V. HOSTERMAN,
WILLIAM CLARKE MASON,
C. J. HEPBURN,
Attorneys for Plaintiff.

189 In United States District Court

KLEIN CHOCOLATE COMPANY, PLAINTIFF

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR Eastern District of Pennsylvania, Defendant

Order Allowing Appeal

Filed May 17, 1929

Before KIRKPATRICK, *J.*

Upon the petition of the plaintiff herein and plaintiff's assignments of error, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment heretofore filed and entered in this cause on the 22d day of April, 1929, be and the same is hereby allowed, and that a certified tran-

script of the record in accordance with the rules of practice of the Courts of the United States be transferred to the said United States Circuit Court of Appeals for the Third Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250, the same to act as a bond for costs on appeal.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

BY THE COURT.

Attest:

GEORGE BRODBECK, *Clerk.*

140 In United States District Court

[Title omitted.]

Præcipe for Transcript of Record

Filed May 17, 1929

To the clerk of the said court:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals for the Third Circuit pursuant to an appeal filed in the above entitled case and to include in such transcript the following:

Docket entries;
Statement of claim;
Affidavit of defense;
Stipulation to try case before court without jury;
Opinion, Kirkpatrick, *J.*, filed November 22, 1928;
Findings of fact and conclusions of law;
Opinion, Kirkpatrick, *J.*, filed January 17, 1929;
Revised opinion, Kirkpatrick, *J.*, filed January 22, 1929;
Bill of exceptions;
Præcipe for judgment;
Judgment;
Petition for appeal; and assignments of error;
Order allowing appeal;
Præcipe for transcript of record;
Physical exhibits;
Clerk's certificate.

S. V. HOSTERMAN,
WM. CLARKE MASON,
C. J. HEPBURN,
Attorneys for Plaintiff.

141 [Clerk's certificate to foregoing transcript omitted in printing.]

142 In United States Circuit Court of Appeals for the Third Circuit

No. 4166. October Term, 1929

KLEIN CHOCOLATE CO., APPELLANT

v.

BLAKELY D. MCCAUGHN, COLLECTOR, APPELLEE

No. 4163

KLEIN CHOCOLATE CO., APPELLANT

v.

EST. B. F. DAVIS, COLLECTOR, APPELLEE.

No. 4164

KLEIN CHOCOLATE CO., APPELLANT

v.

EST. E. LEDERER, COLLECTOR, APPELLEE

No. 4165

KLEIN CHOCOLATE CO., APPELLANT

v.

EST. E. LEDERER, COLLECTOR, APPELLEE

Order assigning judge

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

And now, to wit: This 15th day of November, A. D. 1929, it is ordered that Hon. John Boyd Avis, District Judge for the District of New Jersey, be, and he is hereby, assigned to sit in above case in order to make a full court. (Sgd) JOSEPH BUFFINGTON,
Circuit Judge.

143 [Minute entry of argument and submission Nov. 15, 1929, omitted in printing.]

In United States Circuit Court of Appeals for the Third Circuit

[Filed endorsement omittted.]

HERSHEY CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4157 October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4160 October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4159 October term, 1929

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KLEIN CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4165 October term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4166 October term, 1929
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YORK CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4172 October term, 1929

Appeals from the District Court of the United States for the Eastern District of Pennsylvania

Opinion filed June 6, 1930

Before WOOLLEY and DAVIS, *Circuit Judges*, and AVIS, *District Judge*

AVIS, *District Judge:*

These cases were all tried in the District Court at one time; one opinion was rendered in all of the cases, and although brought into this court by separate appeals, were heard in one argument.

Appellants are all manufacturers of sweet chocolate and sweet milk chocolate, the product of the cacao bean, and made certain payments of amounts alleged to be due the Government as taxes, under the revenue acts of 1918 and 1921 and the regulations of the Internal Revenue Commissioner. All of said payments were made "under protest," and later, at different and sundry times, appellants filed claims for refund with the collectors of internal revenue, in the various districts in which payments had been made, for transmission to the Commissioner of Internal Revenue. All of said claims for refund were rejected by the commissioner, and the suits followed.

The district court, sitting without a jury, heard the testimony, held that the tax was lawfully imposed, and caused judgment to be entered in favor of the defendants, and from these judgments, all of the cases are brought by appeal to this court.

Twenty-nine assignments of error were filed, and relied upon by the appellants, but as a matter of fact they are all merged in one question to be decided, i. e., does the word "candy" in the revenue act of 1918 (Title IX, sec. 900 (9)) and the revenue act of 1921 (Title IX, sec. 900 (6)), include sweet chocolate and/or sweet milk chocolate?

The portion of the act of 1918 under which the tax was assessed and paid, reads as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—

* * * * * * *

"(9) Candy, 5 per centum; * * *" (40 Stat. c. 18, pp. 1057, 1122).

The act of 1921 reads exactly the same, with the exception that the percentage of tax is placed at 3 per cent instead of 5.

The decision of this question rests upon—

(1) The definition of the word "candy."

(2) Whether or not sweet chocolate and sweet milk chocolate is candy in accordance with its commonly accepted use.

(3) Did Congress intend to include sweet chocolate and sweet milk chocolate under the term "candy" in the revenue acts?

(4) Was the regulation of the Commissioner of Internal Revenue conclusive, and did he have authority, under the acts, to include sweet chocolate and sweet milk chocolate under the term "candy"?

(5) Do the classifications promulgated by the Secretary of Agriculture, under the pure food laws, in any way affect the question of the legality of the tax imposed?

Under the evidence in this case, it is rather difficult to define the word "candy." There is nothing in the testimony, outside of the technical definitions, and possibly the classifications promulgated by the Secretary of Agriculture, to assist the court in arriving at a conclusion as to the inclusiveness of the word. Webster defines candy as follows:

"A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruit, nuts, etc. Also, any sweetmeat made of, or coated with, a preparation of sugar or molasses; a piece of confectionery."

The evolution of the use of sweetmeats in modern times may have, and probably has, extended the meaning of the word to other articles than those strictly included in the definition given by Webster.

Counsel for appellants argue that the classification by the Secretary of Agriculture, under the pure food laws and under authority given by Congress, indicates that sweet chocolate and sweet milk chocolate are not included within the designation of "candy."

It is true that in this classification, candy and chocolate, both "sweet" and "sweet milk," are under separate heads, and it is apparent that for purposes of the statute under which this classification was made, it was undoubtedly treated under separate headings, but this may not be conclusive in construing the revenue acts under which this suit was brought. Whether or not "candy" in its technical sense, includes sweet chocolate and/or sweet milk chocolate, we do not deem it necessary to decide, in view of our conclusions, hereinafter set forth, with relation to the intention of Congress when the revenue acts of 1918 and 1921 were enacted.

The court below said, with relation to the word "candy" as it applies to sweet chocolate and sweet milk chocolate:

"It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact. It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion.

While some people might look upon it as candy, we feel that many would call it a food, and in the absence of anything in the record tending to show that this is the popular opinion, we can not sustain the judgment of the court on this theory.

We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.

In all of the tariff and internal revenue acts of Congress from 1792 to 1913, candy generally called "sugar candy," and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate, and, when it was asserted that chocolate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the Members of Congress.

The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in congressional enactments or by executive regulation, included in the term "candy," is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate eo nomine, notwithstanding the fact that the regulations of the commissioner, classifying both as "candy," under the 1918 act, and that the District Court decision in Massachusetts holding they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of De Forest, et al., v. Lawrence, 54 U. S. 273, 281, said:

"And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article

as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the customhouse.

"It is but fair to presume, after having been treated by the lawmakers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used instead of the one known to trade and commerce, if that should be different."

In Reiche v. Smythe, 80 U. S. 162, 166, it was held:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in pari materia, and it will be presumed that if the same word be used in both, and a special meaning were given to it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."

The effect of the distinction recognized by Congress is very aptly referred to in the case of Arthur v. Stephani, 96 U. S. 125, 127, 128, wherein the court, among other things, said:

"Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name.

* * * * * * *

"Contemporaneously and side by side, all the way down, the statutes provide for different rates of duty on the varieties of sugar and on confectionery, as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties.

* * * * * * *

"It is quite evident that Congress has at all times intended to preserve the distinction between these articles, and that the circuit judge decided correctly when he held that chocolate, although in the form and of the character described, was not dutiable as 'confectionery' under the act of 1864."

This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case sub judice.

This is further demonstrated by an examination of the record of deliberations and discussions in the committees; and also upon the

floor of the Senate, when the 1921 act was under consideration, which are corroborative of the facts upon which our conclusions are based.

An examination of the evidence offered in this regard, discloses that a Mr. Fuller, apparently a candy manufacturer, called the attention of the Senate committee to a decision in the United States Court, District of Massachusetts, holding that chocolate was not candy, and not taxable under the 1918 act; and that some provision should be made in the 1921 act to put chocolate upon the same basis as candy, either by removing the tax from candy, or, inferentially, to impose a similar tax on chocolate. Similar representations were made to the House Ways and Means Committee; and the question was discussed quite fully on the floor of the Senate, the understanding, apparently at that time, being that the word "candy," in the revenue act of 1918, did not include sweet chocolate or sweet milk chocolate.

In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the committee a definition of the word "candy," which included sweet chocolate and sweet milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases.

The deliberations of the committees and the facts produced before them when considering the bill, appear to be legal evidence and should be given its due weight. Holy Trinity Church v. United States, 143 U. S. 457, 464; Binns v. United States, 194 U. S. 486, 495.

In spite of the knowledge of the Representatives and Senators in Congress, no definite tax was levied on sweet chocolate or sweet milk chocolate; and from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the revenue acts of 1918 or 1921.

In both the revenue acts of 1918 and 1921, the authority of the commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:

"That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

It will be noted in this statute, that it provides for "rules and regulations" which shall be "for the enforcement of the provisions of this act."

The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly, the Commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

In the case of Morrill v. Jones, 106 U. S. 466, 467, Chief Justice Waite said:

"The Secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

See, also, United States v. United Verde Copper Co., 196 U. S. 207.

A regulation of an executive department construing a statute is given great weight, and is strongly persuasive, and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. See Burk-Waggoner Oil Assn. v. Hopkins (N. D. Tex.), 296 F. 492, and cases cited.

Taking into consideration, the reading of the statute; the prior attitude of Congress with relation to imposition of taxes on chocolate; and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining "candy," afterward promulgated by the commissioner and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant-appellee.

We, therefore, hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the commissioner, approved by the Secretary.

It is contended by the appellants that the classifications of the Secretary of Agriculture, promulgated under the pure food laws, conclusively define chocolate as a product which could not be included under the term "candy," which is also classified in these regulations. These classifications were made under laws relating to pure foods, and, while they might have some effect upon the establishment of the general definition of the respective products, we can not see that they are in any way controlling on the main questions at issue in these cases.

The case of Malley v. Walter Baker & Co. (C. C. A. 1), 281 F. 41, is strongly relied upon by the appellee, it being the contention that this case is controlling as establishing a precedent which in effect should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley case there was no decision upon the question of what Congress intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress, or the proceedings of the committees of Congress in consideration of the bills, was submitted to the court considering that case. We are not able to follow that court

in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word "candy," or in its conclusion that the Commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress.

The judgments of the District Court are reversed and the cases remanded for new trials or other lawful proceedings in conformity with this opinion.

A true copy, teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In United States Circuit Court of Appeals for the Third Circuit.

No. 4166, October term, 1929

KLEIN CHOCOLATE CO., APPELLANT

v.

BLAKELY D. MCCAUGHN, COLLECTOR, APPELLEE

Judgment, June 6, 1930

In error to the District Court of the United States for the District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and the case remanded to the said District Court for further proceedings in conformity with the opinion of this court.

Philadelphia, June 6, 1930.

(Sgd.) VICTOR B. WOOLLEY,
Circuit Judge.

Similar orders entered June 6, 1930 in the following cases:

Klein Chocolate Co., Appellant, v. Est. B. F. Davis, Collector, Appellee, No. 4163;

Klein Chocolate Co., Appellant, v. Est. E. Lederer, Collector, Appellee, No. 4164;

Klein Chocolate Co., Appellant, v. Est. E. Lederer, Collector, Appellee, No. 4165.

[Clerk's certificate to foregoing transcript omitted in printing.]

United States Circuit Court Of Appeals For The Third Circuit

October term, 1929

No. 4163

Klein Chocolate Company, Appellant

vs.

M. Louisa Davis, Executrix of B. F. Davis, Formerly Internal Revenue Collector, deceased, Appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4166, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, U. S. C. C. A. Third Circuit, October term 1929, No. 4166.

Dated June 17, 1929.

S. V. Hoffman,
S. V. Hoffman,
Wm. Clarke Mason,
Wm. Clarke Mason,
C. J. Hepburn,
Attorneys for Appellant.
Gilbert W. Grimm,
Attorney for Appellee.

Approved: June 20, 1929.

Buffington,
C. J. Per curiam.

Endorsement: No. 4163. Stipulation of counsel received & filed July 5, 1929. William P. Rowland, Clerk.

United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss.:

I, William P. Rowland, clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Klein Chocolate Company, Appel-

lant, v. M. Louis Davis, Executrix of B. F. Davis, formerly Internal Revenue Collector, deceased, Apellee, No. 4163, October term, 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of September, in the year of our Lord one thousand nine hundred and thirty and of the independence of the United States the one hundred and fifty-fifth.

[SEAL.] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

149 United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4164

KLEIN CHOCOLATE COMPANY, APPELLANT,

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY INTERNAL REVENUE COLLECTOR, DECEASED, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Klein Chocolate Company, Appellant vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4166, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Klein Chocolate Company, Appellant vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, U. S. C. C. A. Third Circuit, October term, 1929, No. 4166.

Dated June 17, 1929.

S. V. HOSTERMAN,
WM. CLARKE MASON,
GEORGE W. COLES,
C. J. HEPBURN,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved: June 20, 1929.
BUFFINGTON,
C. J. Per curiam.

Endorsement: 4164. Stipulation of counsel received and filed July 5, 1929. William P. Rowland, clerk.

150 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss.

I, William P. Rowland, Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Klein Chocolate Company, Appellant, vs. Grace N. Lederer, Executrix of Ephraim Lederer, formerly Internal Revenue Collector, deceased, Appellee, No. 4164, October Term 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 5th day of September in the year of our Lord one thousand nine hundred and thirty and of the Independence of the United States the one hundred and fifty-fifth.

[SEAL.] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

151 United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4165

KLEIN CHOCOLATE COMPANY, APPELLANT,

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY INTERNAL REVENUE COLLECTOR, DECEASED, APPELLEE.

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term 1929, No. 4166, and that judgment appropriate to the amount involved in this case, shall be entered in this case to the same effect and for the party plaintiff or defendant, as the judgment which will be entered ultimately in the said case of Klein Chocolate Company, Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for Eastern District of

Pennsylvania, Appellee, U. S. C. C. A. Third Circuit, October term 1929, No. 4166.

Dated June 17, 1929.

S. V. Hoffheimer,
S. V. Hoffheimer,
Wm. Clarke Mason,
Wm. Clarke Mason,
C. J. Hepburn,
C. J. Hepburn,
Attorneys for Appellant.
George W. Coles,
George W. Coles,
Attorney for Appellee.

Approved: June 20, 1929.

Buffington,
C. J. Per curiam.

Endorsement: 4165. Stipulation of counsel received & filed Jul. 5, 1929. William P. Rowland, clerk.

152 United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, ss:

I, William P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Klein Chocolate Company, Appellant, vs. Grace N. Lederer, Executrix of Ephraim Lederer, formerly Internal Revenue Collector, deceased, Appellee, No. 4165, October term, 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 5th day of September, in the year of our Lord one thousand nine hundred and thirty and of the Independence of the United States the one hundred and fifty-fifth.

[SEAL.] Wm. P. Rowland,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Supreme Court of the United States

No. 435, October term, 1930

B. D. McCAUGHN, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 432, October term, 1930

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 433, October term, 1930

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the

proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 434, October term, 1930

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

KLEIN CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COP

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 438

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER, vs.
WILBUR-SUCHARD CHOCOLATE CO.

No. 436

EST. E. LEDERER, COLLECTOR, PETITIONER, vs.
WILBUR SUCHARD CHOCOLATE CO.

No. 437

EST. E. LEDERER, COLLECTOR, PETITIONER, vs.
WILBUR SUCHARD CHOCOLATE CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 6, 1930
CERTIORARI GRANTED OCTOBER 20, 1930

(35360, 35358, 35359)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. —

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER

vs.

WILBUR-SUCHARD CHOCOLATE CO.

No. —

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

WILBUR-SUCHARD CHOCOLATE CO.

No. —

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

WILBUR-SUCHARD CHOCOLATE CO.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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1 In United States District Court, Eastern District of Pennsylvania.

March term, 1926. No. 12156

WILBUR-SUCHARD CHOCOLATE COMPANY, INC.

v

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE

Wm. Clarke Mason.
George W. Coles.

Docket entries

Apr. 19, 1926. Præcipe to issue summons filed.
Apr. 19, 1926. Summons exit—returnable 1st Monday in May 1926.
Apr. 28, 1926. Appearance of George W. Coles for defendant filed.
Apr. 28, 1926. Summons returned on April 29 served and filed.
May 4, 1926. Statement of claim filed.
Nov. 14, 1927. Affidavit of defense filed.
Nov. 18, 1927. Præcipe to place case on trial list filed.
Feb. 21, 1928. Stipulation to try case before court without a jury filed.
Mar. 20, 1928. Præcipe to place case on argument list filed.
Apr. 20, 1928. Suggestion of change of name of plaintiff filed.
May 21, 1928. Trial before court without a jury.
May 22, 1928. Trial resumed—witnesses sworn.
June 7, 1928. Plaintiffs request for findings of fact and conclusions of law filed.
June 7, 1928. Argued sur P. & P.
2 June 13, 1928. Testimony filed.
Nov. 22, 1928. Findings of fact and conclusions of law filed.
November 22, 1928. Opinion of the court filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926, No. 12360).
Nov. 22, 1928. On motion of counsel for plaintiff, reargument ordered for December 4, 1928.
Dec. 4, 1928. Reargument sur findings of fact.
January 17, 1929. Opinion sur reargument filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926—No. 12360).
January 22, 1929. Opinion filed November 22, 1928 withdrawn and revised opinion filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926, No. 12360).
Jan. 26, 1929. Plaintiff's exceptions filed.
Jan. 26, 1929. Plaintiff's bill of exceptions and order of court sealing same filed.
Apr. 22, 1929. Præcipe to enter judgment filed.
Apr. 22, 1929. Judgment in favor of defendant, filed.

May 17, 1929. Assignments of error filed.
May 17, 1929. Petition for appeal filed.
May 17, 1929. Order of court granting appeal filed.
May 17, 1929. Precipe for transcript of record sur appeal filed.
June 10, 1929. Bond sur appeal and order of court approving same filed.
June 10, 1929. Citation allowed and issued.
June 10, 1929. Copy of notice of appeal filed.
June 11, 1929. Citation returned "Service accepted" and filed.

3 In United States District Court

[Title omitted.]

Plaintiff's Statement of Claim

Filed May 4, 1926

H. O. Wilbur & Sons, Incorporated, the above-named plaintiff, brings this action against Blakely D. McCaughn, collector of internal revenue for the first district of Pennsylvania, the defendant above named, upon a cause of action whereof the following is a statement:

1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business in the city and county of Philadelphia in said State, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the collector of Internal Revenue of the United States of America for the first district of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located.

3. During the period from July 1, 1921, to December 31, 1921, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $634,651.38.

4 4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of section 900, Title IX, of the revenue act of 1918, did during the period aforesaid assess excise taxes against the plaintiff aggregating $30,138.40.

5. During the period from January 1, 1922, to March 31, 1921, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $2,953,181.14.

6. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of section 900, Title IX, of the revenue act of 1921, did during the period aforesaid assess excise taxes against the plaintiff aggregating $94,193.42.

7. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the said sales of sweet chocolate and sweet milk chocolate heretofore referred to involuntarily and under protest, and at the times hereinafter set forth did involuntarily and under protest pay to the defendant, as collector of internal revenue as aforesaid, a tax of $124,331.82, as follows:

Date paid	Amount	Date paid	Amount
Aug. 31, 1921	$2,217.65	Jan. 29, 1923	$2,722.40
Sept. 29, "	4,837.29	Feb. 24, "	260.98
Oct. 31, "	6,223.62	" 27, "	2,915.16
Nov. 30, "	6,984.11	Mar. 28, "	2,552.15
Dec. 29, "	5,676.62	Apr. 30, "	3,042.53
Jan. 30, 1922	4,199.11	May 31, "	2,519.12
Feb. 28, "	2,561.17	June 29, "	2,902.53
Mar. 31, "	2,335.34	July 31, "	1,920.29
Apr. 1, 1922	2,687.35	Aug. 31, "	1,808.59
Apr. 18, "	60.07	Sept. 30, "	2,781.79
" 29, "	2,814.32	Oct. 31, "	3,274.60
May 31, "	2,183.86	Nov. 30, "	5,176.37
June 28, "	2,404.62	Dec. 31, "	3,915.90
July 31, "	1,662.71	Jan. 31, 1924	3,330.68
Aug. 16, "	142.87	Feb. 29, "	3,591.23
" 30, "	1,682.45	Mar. 31, "	3,417.22
Sept. 19, "	4,377.62	Apr. 30, "	3,041.00
" 27, "	234.85	May 31, "	2,606.12
" 30, "	2,661.70	June 30, "	2,785.23
Oct. 31, "	4,333.13	July 31, "	2,067.12
Nov. 28, "	3,756.87	Aug. 30, "	349.82
Dec. 20, "	235.85		
" 29, "	2,987.78		124,331.82

8. The revenue act of 1918 aforesaid did not impose any tax on sweet chocolate as such, nor upon "tea, coffee, and cacao products."

9. The revenue act of 1921 aforesaid did not impose any tax on sweet chocolate as such, nor upon "tea, coffee, and cacao products."

10. The act of Congress of June 3, 1902, and supplements, authorized the Secretary of Agriculture to establish standards of purity for food products and to classify the same. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such statutory authority, are the official standards of such food products for the United States of America.

11. The standard of purity for food products established by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture and contain the following:

(Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products."

"c. Cacao Products."

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate
7 liquor, chocolate paste, bitter chocolate coatings, contain not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fibre, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fibre, or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

12. The standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under which classification is included "candy," and the said standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "candy."

13. There is no authority vested by act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America, and the only legal standards of purity and classification for food products for the United States of
8 America are the standards fixed by the Secretary of Agriculture by virtue of the power vested in him by act of Congress heretofore referred to.

14. That the tax paid by plaintiff to defendant, as aforesaid, was collected by defendant wrongfully and illegally and to the damage of plaintiff.

15. The plaintiff, in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed a claim for refund, to wit, of the sum of $38,074.39, tax erroneously and illegally collected for the period from May 1, 1921, to December 31, 1921, of which sum $7,985.90

represented payment made to Ephriam Lederer, formerly collector of internal revenue of the first district of Pennsylvania, and $30,138.40 was paid to the defendant above named. The plaintiff also filed its claim for refund to it of the sum of $94,193.42, tax erroneously and illegally collected, all of which was paid to the defendant above named.

On or about November 17, 1925, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the said claims for refund of $38,074.39 and $94,193.42, respectively, were rejected. A copy of said notice of rejection is attached hereto as Exhibit "A."

16. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

17. Wherefore, the plaintiff says that the defendant is indebted to it in the sum of $124,331.82, with interest thereon from the dates of payment aforesaid, and demands judgment against the defendant for that amount, with costs.

WM. CLARKE MASON,
Counsel for Plaintiff.

9 *Duly sworn to by B. K. Wilbur. Jurat omitted in printing.*

Exhibit "A" to Statement of Claim

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Nov. 17, 1925.

MT-ST-WEM cls 344953 and 54

H. O. WILBUR & SONS, INC.,
c/o Wm. Clarke Mason, 934 Land Title Bldg.,
Philadelphia, Pa.

GENTLEMEN: Reference is made to your claims for the refund of $38,074.39 and $94,193.42, respectively, manufacturer's excise tax paid for the period from May 1, 1921, to July 2, 1924.

10 You state that the tax involved in your claims was erroneously paid on certain of your manufactured products which you contend were not subject to tax as candy under section 900 of the revenue acts of 1918 and 1921.

Under date of July 13, 1925, you were requested to forward this office samples of each of the products on which refund of tax is sought, and also samples of the advertising matter used by you in advertising your goods to the trade.

On September 17, 1925, you forwarded to this office through your counsel a list covering all items upon which refund of tax is sought, and also by express samples of the various products upon which the tax claimed in refund was paid.

You are advised that careful consideration has been given to all the evidence presented. It is, however, held that the Wilbur's sweet milk chocolate, Wilbur's vanilla chocolate buds, sweet milk chocolate almond bars, Wilbur's vanilla sweet clover chocolate, American sweet chocolate, etc., upon which the tax involved in the claims was paid, were properly subject to the tax on candy imposed by section 900 of the revenue acts of 1918 and 1921.

Your claims are accordingly rejected.

Respectfully,

D. H. BLAIR, *Commissioner.*

NW-FBN.

11 In United States District Court

[Title omitted.]

Affidavit of defense

Filed November 14, 1927

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

George W. Coles, being duly sworn according to law, deposes and says that he is the United States attorney in and for the eastern district of Pennsylvania, and attorney of record for the within defendant, and makes this affidavit of defense on behalf of the said defendant as follows:

1. Admitted; it is averred, however, that the sweet chocolate and sweet milk chocolate manufactured and sold by the plaintiff is the result of a mixture of the product of the cacao (cocoa) beans, properly treated, with sugar and other ingredients;

2. Admitted;

3. Deponent has no information as to the allocations contained in the third paragraph of the plaintiff's statement of claim, nor has he any means of ascertaining whether the facts therein stated are true or not, and he therefore calls for strict proof thereof;

4. Admitted;

5. Deponent has no information as the the allocations contained in the fifth paragraph of the plaintiff's statement of claim, nor

12 has he any means of ascertaining whether the facts therein stated are true or not and he therefore calls for strict proof thereof;

6. Admitted;

7. The allocations of the seventh paragraph are admitted in so far as they refer to the payment of the tax therein specified and the amounts thereof, under protest;

8. Denied that the revenue act of 1918, as aforesaid, did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate;

9. Denied that the revenue act of 1921, as aforesaid, did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate;

10. The allegations of the tenth paragraph are admitted in so far as they refer to authority in the Secretary of Agriculture "to establish standards of purity for food products," but averred that they are matters wholly immaterial to the issues in this case;

11. The allegations of the ninth paragraph are admitted, but it is averred that they are wholly irrelevant and immaterial to the issues in this case;

12. The allegations of the tenth paragraph are admitted, but it is averred that they are wholly irrelevant and immaterial to the issues in this case;

13. The allegations of the thirteenth paragraph are admitted, in so far as they refer to any authority vested in the Secretary of the Treasury to establish definitions, standards of purity, classifications and definitions of food products for the United States of America, but it is denied that power was vested in the Secretary of Agriculture to establish legal standards of purity, classification and definitions of food products for the United States of America,
13 which would have any control over the Secretary of the Treasury or this honorable court in classifying the sweet chocolate and sweet milk chocolate, upon which taxes were assessed and collected in this case; and it is further averred that all of the allegations contained in paragraph thirteen are wholly irrelevant and immaterial to the issues in this case;

14. Denied that the tax collected, as aforesaid, was wrongfully and illegally collected; but averred that there was warrant in law for the tax collected by the defendant and that such tax was sustained by the Circuit Court of Appeals for the First Circuit in the case of Malley, Collector, v. Walter Baker and Company, Limited, reported in 281 Fed. Rep. at page 41.

It is further averred that the tax collected, as aforesaid, was rightfully and legally collected on the manufacture and sale of sweet chocolate and sweet milk chocolate, manufactured by the plaintiff;

15. Admitted;

16. Admitted;

17. Denied that the defendant is indebted to the plaintiff in any amount or that the plaintiff is entitled to recover under implied contract or otherwise, from the defendant in any amount;

All the facts herein stated are true to the best of my knowledge; the facts stated upon information from others I believe to be true; and all of them I expect to be able to prove upon the trial of this cause.

GEORGE W. COLES,
Attorney for Defendant.

Subscribed and sworn to before me this 14th day of November, 1927.

GILBERT W. LUDWIG,
Deputy Clerk, District Court United States,
Eastern District of Pennsylvania.

(Seal of U. S. Dist. Ct. E. D. Pa.)

14 In United States District Court

[Title omitted.]

Stipulation waiving jury

Filed February 21, 1928.

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes.

GEORGE W. COLES,
United States Attorney.
WM. CLARKE MASON,
Attorney for Plaintiff.

PHILADELPHIA, PA.

15 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Opinion of the court *

KIRKPATRICK, *J.*

Filed November 22, 1928

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular

* NOTE.—This opinion (filed November 22, 1928), for which the Revised Opinion of January 22, 1929, was substituted, was changed by the latter in the following particulars only:
(a) The sentence, "This decision had been appealed from and the case was pending in the Circuit Court of Appeals," appearing in the 11th and 12th lines of page 18 was omitted from the Revised Opinion.
(b) The words, "the pending," appearing in the 2nd and 3rd lines from the bottom of page 18 were omitted from the Revised Opinion.
(c) The words, "concededly not an eo nomine description," appearing in the 17th and 18th lines of page 23 were omitted from the Revised Opinion.
See pages 30 to 39, both inclusive, for Revised Opinion.

case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

16 The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy
17 departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: Solid chocolate bon bons, "chocolate kisses," "chocolate delights," "Sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as "'a confection' in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of

Congress of June 8, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history ap-
18 plies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. This decision had been appealed from and the case was pending in the Circuit Court of Appeals. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of can not be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions can not be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority

disagreed with that view and confidently expected that it would be reversed on the pending appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, co nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate co nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section" and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff acts of March 3, 1883, the classifications are "sugar candy," "all other confectionery," and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principles of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 163, and other cases.

These decisions announce a well-established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding, therefore, that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved can not be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity
21 and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485. A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's interpretation of Statutes, Sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted
22 in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 63 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404); and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even over-riding the literal meaning of the words themselves. When we examine the Revenue Acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor
23 does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate which was the subject of the

suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term concededly not an eo nomine description, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold.

It was so held in Malley *v.* Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said: "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treas-
24 ury is not to define terms, but to enforce the act as written; (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act; and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite directions, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley *v.* Walter Baker

& Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the Court:

W. H. KIRKPATRICK, *J.*

(Filed, Nov. 22, 1928.)

25 In United States District Court, Eastern District of Pennsylvania

WILBUR-SUCHARD CHOCOLATE COMPANY, INC.,

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR THE First District of Pennsylvania

Findings of fact

Filed Nov. 22, 1928

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

CONCLUSIONS OF LAW

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the court:

W. H. KIRKPATRICK, *J.*

26 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

Opinion sur reargument

KIRKPATRICK, *J.*

Filed January 17, 1929

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above-entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court, in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company, stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

27 The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases:

"In addition thereto, the statements of fact contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12,360, June term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are, first, that the above manner of finding facts is not proper practice, and, second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases, but only in some of them.

As to the first objection, I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial Judge and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of proper practice in stating the fact as it should be stated. If he makes such a statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's
23 findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit however because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say: "If Congress has been accustomed to use a

certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect of the opinion in that case to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all.

The act there under consideration was a special act allowing a 29 suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damage" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy" however we have just the opposite situation. Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co. #94, October term, 1928) the general rule referred to is reaffirmed. The court said: "Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity, United States v. Goldenberg, 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in other acts of Congress. That matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the later considerations were the more important and controlling ones.

The conclusions reached in the opinion filed will not be changed.

By the court:

W. H. KIRKPATRICK, J.

30 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHIN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Revised opinion of the court

KIRKPATRICK, *J.*

(Filed January 22, 1929)

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the Act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

31 The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with

the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "Solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the
32 products in question are usually consumed in the same manner as candy; that is, eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a Revenue Statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding

it when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of cannot be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232, U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word "candy" from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mosly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section," and "Unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate,

sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery," and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 162, and other cases.

35 These decisions announce a well-established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding, therefore, that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved cannot be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Ham-

ilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485.

A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed 26 that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's Interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeals 404), and varying conclusions have been reached.

Curiously enough, both parties insist that the meaning of the term is clear and unambiguous (and, therefore not open to construction), and yet both have advanced a number of arguments based 27 upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the

revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the circuit court of appeals for the first circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use of which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word
38 in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said: "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is

not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

In United States District Court

WILBUR-SUCHARD CHOCOLATE COMPANY, INC., PLAINTIFF,

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR THE First District of Pennsylvania, defendant

Plaintiff's bill of exceptions

CAPTION

Be it remembered, that in the said term of March, 1926, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said plaintiff declared

(prout statement) and the said defendant pleaded (prout plea). And thereupon issue was joined between them.

And thereafter by stipulation filed of record on the 21st day of February, 1928, it was "stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes."

And afterwards, to wit, at a session of the said court, held in the district aforesaid before the Honorable W. H. Kirkpatrick, judge of the said court, on the 21st day of May, 1928, the said issue between the said parties came to be tried by the court without a jury, at which day came as well the said plaintiff as the said defendant by their respective attorneys; and upon the trial, the witnesses being duly sworn or affirmed the following testimony was produced:

41 Transcript of Testimony and Rulings

[Title omitted.]

Before KIRKPATRICK, *J.*

Philadelphia, Pa., Monday, May 21, 1928, at 10.00 o'clock a. m., eastern daylight-saving time.

Present: William Clarke Mason, Esq., and A. Allen Woodruff, Esq., for plaintiff; R. W. Wilson, Esq., and Mark Thatcher, Esq., for defendant.

Plaintiff's evidence and stipulated facts

Mr. MASON. If your honor please, in cases brought by the Hershey Chocolate Company against B. F. Davis, formerly collector, Nos. 10726 and 10824, and in cases brought by the Hershey Chocolate Company against Ephraim Lederer, formerly collector, Nos. 10825 and 10826, we ask leave to file stipulations amending the name of the defendant by substituting "executrix" in each case, both of those defendants having died and executrixes having been appointed. In the case of B. F. Davis, we substitute "M. Louisa Davis" as the executrix of the estate of the said B. F. Davis, deceased, and in the case of Ephraim Lederer we substitute "Grace N. Lederer" as the executrix of the estate of Ephraim Lederer, deceased.

If your honor please, if I may, before starting the proof, I will outline to you, in a very brief way, just what the problem of procedure is that we have here and ascertain whether it meets with your honor's approval.

42 There are sixteen cases all told, three of them in which the Wilbur-Suchard Chocolate Company is plaintiff, four in which the Klein Chocolate Company is plaintiff, three in which the York Chocolate Company is plaintiff, and six in which the Hershey Chocolate Company is plaintiff, all of them against the collector of internal revenue in office at the time the taxes were paid, and all of them for the payment to the plaintiffs of moneys paid by the manufacturers for excise taxes upon candies under the Act of 1918 and 1921.

Counsel for the Government and counsel for the plaintiffs have found in these cases that, so far as we can see in advance of the proof, substantially all of them involve the same questions. There may be some variations, however, in the proofs in relation to the products of one manufacturer that will not be the same as the proofs in relation to the products of other manufacturers, and on the assumption that that difference may arise, and to protect the record, which is being made in so many cases tried together, the plan which we propose is this, sir: That the admitted facts in the record of pleadings be put upon the record in each one of the sixteen cases, that the documentary proof, in so far as it is general—and I think it will be general as to all of them—be offered as to all of the cases, that means as to each of them be offered at the one time, that when it comes to oral proof, the witness, when called, shall be called as a witness in the case of one or the other plaintiffs, and that his testimony shall be taken as though given in each of the cases for that particular plaintiff, but as to no others until his testimony is concluded along the particular line in which the examination and cross examination is desired, that at the end of the examination of that particular witness, counsel will then indicate—presumably by agreement—whether, in addition to the testimony being taken for the cases of one of the four plaintiffs, it shall also be taken for the cases of the other three plaintiffs.

The COURT. At the conclusion?

Mr. MASON. At the conclusion of that testimony, and
48 we will then indicate, for the record purposes, how far beyond the original call the testimony shall be extended, in order that not only the court and counsel may have an appreciation of the record facts for the several cases, and the limitation of them, but that the stenographer, in making the record for us, will be guided at that time in the reference to the extent to which that testimony is to be applied, and we expect, sir, that by so doing, we will not only be able to keep these cases and the record of them clearly in line, but that we will be able substantially to save the time of the court and expedite the trial.

The COURT. How many records are you going to make?

Mr. MASON. Our thought——

The COURT. That is surely a way to save time, but what are you going to do about the record?

Mr. MASON. Our thought, sir, we will make our records, and at the end of the hearings before your honor, if all of the testimony is general, we will ask that one record be made up for your honor's consideration and the consideration of counsel.

The COURT. If all the testimony——

Mr. MASON. If all of the testimony applies to all of the cases.

The COURT. For instance, if you call a witness in the three Wilbur cases, and all the testimony applies to all of them——

Mr. MASON. We will make up the one record.

The COURT. Suppose you call a witness in Wilbur, and Klein says that his testimony is applicable to him, and Hershey says so, then you will have to make a separate record?

Mr. MASON. Then, there will be separate records made, but when I speak of making up one record at the end of the testimony, I mean one record preliminarily. Of course, there will be eventually, in all probability, a complete transcript of all of the cases. We will endeavor to so present it that you will not have in the pre-
44 liminary stage of consideration of these cases more than the one record, except where certain testimony is applicable to certain cases only, and in that event, of course, a separate record will be made up for those cases.

Now, sir, pursuant to the agreement made with counsel for the Government and counsel for the plaintiffs, in the opening we desire to offer in evidence those facts set forth in the sixteen statements of claim, which have been admitted by the affidavit of defense or by consent of counsel.

The COURT. Have you copies of those statements?

Mr. MASON. I am going to give your honor a copy of each one, and to state to your honor that on the face of each statement of claim there is marked by lead pencil bracket, on the outside margin, the admitted facts. In several of the paragraphs there are internal brackets, which relate to words in those paragraphs to be excluded, and we shall ask that the stenographer note, for the purposes of the record, in each case those portions of the statement of claim which are indicated as I have stated, and include them as a part of the record of each case from the pleadings and admissions of counsel as facts admitted in these cases with the same force and effect as if they had been otherwise proved.

For the purpose of the record, may I say this: That in all of the statements of claim where reference is made in language similar to the language in the case of Wilbur-Suchard Company against Grace N. Lederer, No. 10774, to the standards for food products and the definitions of the same, set forth in that statement of claim in paragraphs 7, 8 and 9, the Government—while the pleadings admit the facts as stated in those paragraphs are true—desires to note an objection, and will press and argue the objection to your honor on the admissibility of those facts relating to those standards in these cases, and I call the attention of your honor, for record purposes, that that objection is to be noted wherever those paragraphs appear in the record of each of the cases.

45 The paragraphs referred to are as follows:

7. The act of Congress of June 3, 1902, and supplements, authorized the Secretary of Agriculture to establish standards of purity for food products and to classify the same. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such statutory authority, are the official standards of such food products for the United States of America.

8. The standard of purity for food products established by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture and contain the following:

(Circular 136, page 18)

"E. Tea, Coffee, and Cacao Products"

"c. Cacao Products."

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains no more than three per cent. (3%) of ash insoluble in water, three and fifty hundredths per cent. (3.50%) of crude fiber, nine per cent. (9%) of cacao starch, and not less than forty-five per cent. (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent. (12%) of whole milk solids in the finished product."

9. The standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under which classification is included "candy," and the said standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "candy."

In addition to the numbered paragraphs in each of the sixteen cases, to which reference is made for the admitted facts, I also offer in evidence the letters attached to the several statements of claim as exhibits in each of the cases to which the letters appear as exhibits, from the Department of Internal Revenue, in which there is set forth the fact that claims for refunds made have been rejected. Those letters are admitted to have been sent by the department and received by the plaintiffs, and are part of the records of these cases.

So that your honor and all of us on this side of the bar will appreciate just what is involved by these admissions, I call your honor's attention to a typical case, and I am reading from Wilbur-Suchard, No. 10774. The first paragraph sets forth the identity of

the plaintiff, and the second the identity of the defendant. The third sets forth the fact that during the period in question, the plaintiff sold to its customers sweet chocolate and sweet milk chocolate having a selling price of the amount therein set
47. forth. Those sales will not be made evident by the details of the records. They have been examined and covered by council for both parties, and the facts are admitted.

The fourth paragraph sets forth the assessment of the excise tax under the revenue act of either 1918 or 1921.

The fifth sets forth the fact that, under protest, the returns were made and the tax paid.

The seventh, eighth, and ninth paragraphs are the paragraphs setting forth the fact that under the act of Congress of June 3, 1906, and supplements, the Secretary of Agriculture established standards of purity for food products, classified the same and defined them which are set forth in the classification.

The tenth——

The COURT. He says that he is authorized to establish standards and to classify, but where does he say he defines them?

Mr. MASON. We set forth the fact, sir, that the standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to statutory authority, are the official standards of such food products for the United States of America.

The COURT. Yes.

Mr. MASON. Then, in paragraph ten, the admitted fact is that there is no authority vested by act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America.

The twelfth provides that we have complied with the required regulations and statutory proceedings to claim our refund, and that the refunds were denied, and that the refund of the tax, as made, has been refused.

Your honor, therefore, has before you the admitted facts in the case, with the Government's objections to the relevancy of the standards, and if Mr. Thatcher deems it well, we might dispose of that question now, so that we may have your honor's thought about it.

48 Mr. WILSON. If your honor please, it is admitted, as alleged in the various statements of claim of all these cases, that the Department of Agriculture has been given authority, under the act of Congress, to establish and maintain standards and classifications of food products. We have no quarrel with that proposition at all.

The Government contends that in the instant cases these allegations relating to the authority of the Secretary of Agriculture are immaterial and irrelevant, by virtue of the fact that, under the act of Congress of 1918 and also of 1921, the Commissioner of Internal Revenue was given express authority to promulgate such rules and

regulations as would be reasonable, and would amount to a reasonable interpretation and application to all subjects taxed under the revenue acts. The Congress did not attempt, at the time of the passing of those acts, to add any interpretation of any words used.

In section 900, Subdivision IX, we find the single word "candy." Under that section 900, an excise tax, manufacturer's excise tax of 5 per cent. will be levied on candy, and, pursuant to that section, the commissioner, by virtue of the authority vested in him by Congress, proceeded to define "candy" and to levy this tax of 5 per cent on products which come within that definition.

The COURT. What is it the Department of Agriculture defines?

Mr. WILSON. The plaintiffs in these cases having alleged in paragraphs 7, 8, and 9—they have dealt somewhat with the history of the congressional act, under and by virtue of which the Secretary of Agriculture has been given authority to establish standards of purity for food products and, as I say, we do not dispute that——

The COURT. Yes, sir; but what does it say? I have not read it. In what way does the Department of Agriculture define it?

Mr. WILSON. The Department of Agriculture has issued certain circulars, which are quoted verbatim in these statements of
49 claim, in paragraph 8, wherein it is alleged that the standard of purity for food products was in force May 14, 1919.

The COURT. They put sweet chocolate under the head of——

Mr. WILSON. By the Department of Agriculture sweet chocolate is considered under the head of subdivision "E. Tea, coffee, and cacao products."

The COURT. Yes; all right. It does not happen to be under candy?

Mr. WILSON. No; in the Department of Agriculture it is handled under "Sugars and related substances."

The COURT. Go ahead.

Mr. WILSON. And our contention is that these allegations are wholly immaterial to the issues in this case by virtue of the fact that Congress has, in its revenue acts, specifically designated a certain product, which it says shall be taxed and defines that product, and names it as "candy," and pursuant to that congressional act the commissioner has set up a definition for taxation purposes, in which the words "milk chocolate" and "sweet chocolate" shall be used and defined as "candy."

It is our contention that whatever authority the Department of Agriculture may have, it is wholly immaterial. We do not deny it, but we do not see where it has any place in these cases. The fact that in the Department of Agriculture "candy" and the other term that was used, "sugars and related substances," are in a separate and distinct classification, may be changed, does not take away from Congress, in 1918, the right to say that a certain product, "candy," may be taxed, nor does it take away from the Commissioner of Internal Revenue, under the authority that is vested in him by the internal revenue acts, the right to so treat sweet milk chocolate.

Mr. MASON. With your honor's permission and with the consent of the Government, in view of the argument that has been advanced by Mr. Wilson, I am going to amplify the offer.

The COURT. How are we on the record? Has this offer been objected to on the ground that it is immaterial?

50 Mr. MASON. As I understand, the Government has objected to the admission of paragraphs 7, 8, and 9 in the case that I read from, and to the other statements in the other cases of a similar nature on the ground of irrelevancy.

In view of the fact that it was my purpose later to elaborate the averments by offering the full circulars—the standards and the definition—so that the record would be complete, I will offer those now, and I understand the Government makes the same objection.

Mr. WILSON. Yes.

Mr. MASON. The Government makes the same objection to those offers and I will direct my answer to the Government's objection.

The offer, which is now made, is the offer of the——

Circular No. 10, issued by the Department of Agriculture, on November 20, 1908, entitled "Standards of Purity for Food Products";

Circular No. 13, issued by the Department of Agriculture, on December 20, 1904, entitled "Standards of Purity for Food Products";

Circular No. 17, issued by the Department of Agriculture, on March 8, 1906, entitled "Standards of Purity for Food Products";

Circular No. 19, issued by the Department of Agriculture, on June 26, 1906, entitled "Standards of Purity for Food Products";

Circular No. 136, issued by the Department of Agriculture, on May 14, 1919, entitled "Standards of Purity for Food Products";

A certified copy of what is entitled "Food Inspection Decision 168 (generally known as "F. I. D."), issued by the Secretary of Agriculture, February 15, 1916; and

A similar food inspection decision, No. 191, issued by the Department of Agriculture January 19, 1923.

(Papers in question marked "Plaintiff's Exhibits 1 to 7," respectively, both numbers inclusive.)

Mr. MASON. Those include a statement and make reference to
51 the authority on which action was taken by the Secretary of Agriculture, and form the basis for the promulgation of those circulars and decisions.

That authority goes back to the act of June 3, 1902, which is to be found in 32 Statutes at Large, 286, on page 296, in which Congress states: That the authority was given and the appropriation was made, as set forth in that act, to enable the Secretary of Agriculture, in collaboration with the Association of Official Agricultural Chemists and such other experts as he may deem necessary, to establish standards of purity for food products, and to determine what are regarded as adulterations therein for the guidance of the officials of the various States and of the courts of justice.

Pursuant to that authority, the Secretary secured the assistance of various official bodies, those who participated in the compilation of the standards and the definitions being referred to in the official documents issued by the Secretary, and included in them was Dr. Charles A. Crampton, chemist for the Bureau of Internal Revenue, as well as the representatives of the various organizations throughout the country, competent to express opinions concerning the products covered by the regulations and competent to aid in making a definition for them.

Your honor will find in these official documents that there is given the classification to "chocolate" in the regulations, that were in force at the time the act of 1918 was passed and "candy," which clearly differentiates the two products, and having been so classified, and having been defined, as you will see in those regulations, we have, by authority of Congress itself, a designation for the one and for the other, which separates them as different things, and those classifications having been made pursuant to the authority given by Congress in 1902, being in force in 1918, being compelled upon all the other departments concerned with the law applicable to the subject matter of the regulations, they are offered here as evidence to establish the fact that at the time the act of 1918 and the act of 1921 were passed, there was in the mind of Congress,
52 as a result of the action taken pursuant to this authority, a clear distinction between "candy" and "sweet chocolate," and for that reason and for the further reason that not only was Congress thereby guided, but as the acts themselves said, they were for the guidance of the courts of justice—and we are now in a court of justice—we think it is most appropriate that they should be made a part of the record in this case, as an aid to determining what is the meaning that Congress gave to the word "candy" when it adopted that designation as the basis for classification and taxation.

The Court. The ruling of the court will be reserved on this question. Proceed with the case.

(Copies of the paragraphs in plaintiff's statement of claim, heretofore referred to, follow:)

53 1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business in the city and county of Philadelphia in said State, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the collector of internal revenue of the United States of America for the first district of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located.

3. During the period from July 1, 1921, to December 31, 1921, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $634,651.33.

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of section 900, Title IX, of the revenue act of 1918, did during the period aforesaid assess excise taxes against the plaintiff aggregating $30,138.40.

5. During the period from January 1, 1922, to March 31, 1924, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $2,953,181.14.

6. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of section 900, Title IX, of the revenue act of 1921, did during the period aforesaid assess excise taxes against the plaintiff aggregating $94,193.42.

7. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States (but not lawfully collectible against the plaintiff), the plaintiff made a return of the said sales of sweet
54 chocolate and sweet milk chocolate heretofore referred to involuntarily and under protest, and at the times hereinafter set forth did involuntarily and under protest pay to the defendant, as collector of internal revenue as aforesaid, a tax of $124,331.82, as follows:

Date paid	Amount	Date paid	Amount
Aug. 31, 1921	$2,217.65	Jan. 29, 1923	$2,722.40
Sept. 29, "	4,837.29	Feb. 24, "	260.98
Oct. 31, "	6,223.62	" 27, "	2,915.15
Nov. 30, "	6,984.11	Mar. 28, "	2,552.15
Dec. 29, "	5,676.62	Apr. 30, "	3,042.53
Jan. 30, 1923	4,199.11	May 31, "	2,519.13
Feb. 28, "	2,561.17	June 29, "	2,902.68
Mar. 31, "	2,335.34	July 31, 1923	1,920.29
Apr. 1, "	2,687.35	55 Aug. 31, "	1,808.39
" 18, "	60.07	Sept. 30, "	2,781.79
" 29, "	2,814.32	Oct. 31, 1923	3,274.69
May 31, "	2,183.86	Nov. 30, "	5,176.27
June 28, "	2,464.62	Dec. 31, "	3,915.90
July 31, "	1,662.71	Jan. 31, 1924	3,330.68
Aug. 16, "	142.87	Feb. 29, "	3,591.23
" 30, "	1,682.48	Mar. 31, "	3,417.23
Sept. 19, "	4,377.62	Apr. 30, "	3,041.03
" 27, "	264.85	May 31, "	2,606.12
" 30, "	2,661.70	June 30, "	2,785.23
Oct. 31, "	4,333.13	July 31, "	2,067.13
Nov. 28, "	3,756.87	Aug. 30, "	349.83
Dec. 20, "	235.85		
" 29, "	2,987.78		124,331.82

10. The act of Congress of June 8, 1902, and supplements, authorized the Secretary of Agriculture to establish standards of purity for food products and to classify the same. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such statutory authority, are the official standards of such food products for the United States of America.

11. The standard of purity for food products established by the United States Department of Agriculture in force as of May 14,

1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture and contain the following:

(Circular No. 136, page 18)

"E. Tea, Coffee and Cacao Products

"c. Cacao Products

"3. Chocolate, plain chocolate, bitter chocolate, chocolate
58 liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

12. The standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under which classification is included "candy," and the said standards do not classify sweet chocolate and sweet milk chocolate under the sub-classification therein contained of "candy."

13. There is no authority vested by act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America.

15. The plaintiff, in accordance with the provisions of the
57 act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed a claim for refund, to wit, of the sum of $38,074.39, tax erroneously and illegally collected for the period from May 1, 1921, to December 31, 1921, of which sum $7,935.99 represented payment made to Ephraim Lederer, formerly collector of internal revenue of the first district of Pennsylvania, and $30,138.40 was paid to the defendant above named. The plaintiff also filed its claim for refund to it of the sum of $94,193.42, tax erroneously and illegally collected, all of which was paid to the defendant above named.

On or about November 17, 1925, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the said claims for refund of $38,074.39 and $94,193.42, respectively, were rejected. A copy of said notice of rejection is attached hereto as "Exhibit A."

16. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

Exhibit "A"

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Nov. 17, 1925.

MT-ST-WEM cls-344953, and 54

H. O. WILBUR & SONS, INC.,
% Wm. Clarke Mason, 934 Land Title Bldg.,
Philadelphia, Pa.

GENTLEMEN: Reference is made to your claims for the refund of $38,074.39 and $94,193.42, respectively, manufacturer's excise tax paid for the period from May 1, 1921, to July 2, 1924.

You state that the tax involved in your claims was erroneously paid on certain of your manufactured products which you contend were not subject to tax as candy under section 900 of the revenue acts of 1918 and 1921.

Under date of July 13, 1925, you were requested to forward this office samples of each of the products on which refund of tax is sought, and also samples of the advertising matter used by you in advertising your goods to the trade.

On September 17, 1925, you forwarded to this office through your counsel a list covering all items upon which refund of tax is sought, and also by express samples of the various products upon which the tax claimed in refund was paid.

You are advised that careful consideration has been given to all the evidence presented. It is, however, held that the Wilbur's sweet milk chocolate, Wilbur's vanilla chocolate buds, sweet milk chocolate almond bars, Wilbur's vanilla sweet clover chocolate, American sweet chocolate, etc., upon which the tax involved in the claims was paid, were properly subject to the tax on candy imposed by section 900 of the revenue acts of 1918 and 1921.

Your claims are accordingly rejected.

Respectfully,

D. H. BLAIR, *Commissioner.*

NW-FBN.

Mr. MASON. In order that we will have here for record purposes a reference to the statements under consideration, sir, I will call your honor's attention to the revenue act of 1918, Title IX, section 900, subdivision (9), to be found in 40 Statutes at

Large, 1157, page 1122; that section, as it stands, reading "Candy, 5 per cent."

The provision of the revenue act of 1918, under this title, imposing the taxes that were provided for in the various following sections and subsections, reads—as I shall give it to your honor in just a minute—"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which sold or leased," that language being the language with which Title IX, section 900, starts, subsection (9) of that section providing the percentage for candy as 5 per centum.

In view of the fact that, in addition to the act of 1918, these cases involve the provisions of the act of 1921, we call your honor's attention to certain legislative history of the act of 1921, and we desire to offer in evidence, so that it may be upon the record—even though your honor may take judicial notice, this is to have it available for record purposes—the proceedings of certain hearings before the Senate Finance Committee, engaged in the work of promulgating the act of 1921. We offer in evidence a certified copy of so much of the public hearings before the Senate Finance Committee, held May 9 and May 27, 1921, which relates to the proposed tax on candy, as set forth on pages 697 to 703 of the printed reports of those proceedings, the certificate being made by Elmer W. Pratt, clerk of the Committee on Finance.

Mr. WILSON. What is the purpose of your offer?

Mr. MASON. Counsel for the Government asks us for the purpose of that offer.

The COURT. You did state that.

Mr. MASON. I tried to make clear that the purpose of this offer and the subsequent offers will be to try to establish the legislative history of the act of 1921.

60 The COURT. Surely.

(Paper in quesion marked "Plaintiff's Exhibit 8.")

Mr. MASON. Your honor wil recall that the act of 1918 provided for a tax upon candy. When the act of 1921 was under consideration, as shown by this particular report, there were a number of witnesses who presented to the Senate Finance Committee the scope of the previous enactment and complained of the manner in which that statute had not reached competitive products, and among those who raised the question, that there was a failure by then-existing legislation to equalize the taxation, by reason of the fact that certain products were taxed and certain products were not taxed, were the representatives of the National Confectioners Association, called upon to speak for the candy manufacturers, and in the course of their presentation of the problem, which the candy manufacturers had under the then-existing act, an din support of a request that there should be an equalization of competitive industries, the candy manufacturers called the attention of the Senate Finance Committee to the fact that sweet chocolate was a product in competition with candy, which was not then subject to taxes.

Your honor will find in the argument not only the general language used to show the manner in which chocolate and other products competed with candy, but you will find the statement made, in the first instance, by Mr. Fuller, and, again, my recollection is, by Mr. Price that under the decision of the United States court in Massachusetts, it had been decided that the act of 1918, levying a 5 per cent tax upon candy, did not levy a tax of a similar amount or any amount upon sweet chocolate, which was a competitor of candy. That matter is brought to the attention of the Senate Finance Committee in this language—Mr. Fuller, speaking, on page 699, says this:

"Many articles made from the same ingredients pay an excise tax when manufactured by candy manufacturers, but no specific taxes when manufactured by others, such as cake and cracker
61 manufacturers. Examples of this are stuffed dates, with which you are familiar, fig-filled Newtons, salted peanut chocolate bars, etc.

"The United States District Court of Massachusetts has just held that sweet chocolate bars—not the bitter chocolate used by housewives for cooking—are not subject to the 5 per cent excise tax. These bars are universally sold in direct competition with candy paying the 5 per cent excise tax.

"These are the sort of bars to which I refer [indicating samples] and which you see sold constantly in drug stores and news stands.

"Senator WATSON. Was that question tested in the courts?

"Mr. FULLER. In the United States District Court of Massachusetts, Senator Watson.

"Senator DILLINGHAM. In that popular way they are sold as candy?

"Mr. FULLER. Yes, sir; and they are sold in competition with candies universally. These bars are universally sold, as I have stated, in direct competition with candy which pays the 5 per cent excise tax."

Page 701, Mr. Price speaking also, for the Manufacturers' Association, and as president of the National Candy Company, calls the committee's attention to the fact, in his words:

"It has been recently held by the Massachusetts courts that a chocolate manufacturer may take a piece of chocolate and put a nut in it and it is a food and not subject to tax. We take a nut and coat it with chocolate and it is subject to tax.

"All of these items come in direct competition with candy."

During the hearings upon the revenue act of 1921, the hearings before the House's Ways and Means Committee afford a part of the legislative history of that act, and we offer so much of the hearings of the Committee on Ways and Means—a report of which is certified to by Clayton F. Moore, clerk of the Committee of Ways
62 and Means—as relates to the subject matter of the inquiry before your honor, and reading from page 252 to page 253 of that report, I call your honor's attention to the fact that before

the House's Committee of Ways and Means the representatives of the candy manufacturers presented the same request to the House as they presented to the Senate for a protection to the candy manufactures from the competition of products sold in competition with candy, and not bearing a tax, and emphasized the fact to the members of the Ways and Means Committee that chocolate—sweet chocolate, in the form sold in competition with candy, did not bear the excise tax. The language that I am reading is the language of Mr. Fuller, beginning on page 252:

"It had been my intention, gentlemen, but circumstances manifestly would not permit that, to erect here before you a counter such as you see in the small neighborhood stores, the general country stores, and the 5 and 10 cent stores, because that is where the great bulk of candy is sold, and I would put in that counter these various pieces of candy, in the form in which they are sold, bulk goods, marked as 120 count goods, three for a penny, two for a penny, and so on.

"Congressman FREAR. You are urging that they be taxed the same as on the candy, as I understand?

"Mr. FULLER. I would say, conversely, Mr. Frear, we are urging that we be not taxed when we are forced to sell our articles in competition with those articles; and I would put in that counter tops, toy balloons, squawkers, marbles, glass agates——

"Mr. FREAR. (interposing). Baseballs and bats?

"Mr. FULLER. Yes, sir; and these other things that sell for a penny, or a nickel or a dime. I wish, gentlemen, we could take a child into a store in your presence and give that child a nickel and you could see the child consume half an hour or an hour of the time of the proprietor of that store shopping. Gentlemen, the child is the champion shopper of the country, and he will determine then whether he is getting a penny's worth or a nickel's worth or a dime's worth of candy, or whether he is going to go out and buy something that is not paying any of these taxes, such as the tops or the squawkers or the marbles, or these other things."

The COURT. He is not interested in quality, but more in the quantity.

Mr. MASON. The most for the money.

The COURT. Yes; cough drops are very popular.

Mr. MASON:

"I have already referred to the fact that many articles which are manufactured by candy manufacturers pay a tax, while the same articles can be manufactured and sold by bakers and cracker manufacturers without paying a tax. Furthermore, the United States District Court of Massachusetts has just held that the sweet chocolate bars—the small sweet chocolate bars with which you are familiar—are not a candy, and that therefore they are not subject to this 5 per cent manufacturers' tax, and yet they are sold in all these stores, and at news stands, and on the trains, etc., in direct competition with candy.

"Mr. FREAR. Would it help matters if we taxed them?

"Mr. FULLER. It would help matters to this extent, Mr. Frear; it would put everybody on the same competitive level; but it would not be fair for us to come here, I think, and suggest that you tax other items, because of the manifest criticism of an industry.

"Mr. FREAR. That is not the question. We have got to raise the taxes from some source and we want to find out what your recommendations are.

"Mr. YOUNG. Your recommendation is to take it off your product.

"Mr. FULLER. Yes, sir.

"Mr. YOUNG. And if not, then you think it ought to be put on competitive products?

"Mr. FULLER. I do not like to say that, Mr. Young. I would much rather the committee would draw its own conclusions."

(Book in question marked "Plaintiff's Exhibit 9.")

64 Mr. MASON. Following that, your honor will take judicial notice of the fact, and from these reports you will see that the committees reported the act of 1921 in a form which should not include a tax upon sweet chocolate or sweet milk chocolate. There was, however, a plan in the act that as reported, as your honor will see from the various Congressional Records of that time, a change in the tax on candy, and a change that provided for a similar graduated tax based upon the price of candy, but referring to the products taxed as candy, and not as sweet chocolate, and not in conjunction with sweet chocolate, nor including sweet chocolate in it, the language being identical with the language of the act of 1918, in so far as that commodity is concerned.

The COURT. What kind of a tax is that?

Mr. MASON. They proposed a graduated tax that would ultimately impose a tax of ten per cent upon candy selling at a maximum price, but the commodity that was to be taxed was still candy with no additions to that word. There was considerable debate in the House and Senate as to whether or not the candy industry could stand more than the smaller tax, and there was a committee amendment proposed that would change the method of taxing, as originally suggested. That debate extended over some substantial period of time.

I desire to offer from those debates, as part of the legislative history of the act of 1921, so much of the debates as are reported in the Congressional Records for the 67th Congress, first session, as of Tuesday, November 1, 1921, being in volume 61, and to be found on pages 7879, in so far as it relates to the subject matter of this hearing; the volume also carries a number; the volume carries 61, No. 144. The page to which I have reference is 7879, without reading the entire debate, sir. Following the general debate upon the quantum the tax on candy should cover, there was a discussion as to whether or not it covered certain commodities also, and on page 7879, in answer to inquiries made by Senator Reed, of Missouri, who is al-

ways inquisitive, Senator LaFollette stated: "Sweet chocolate is not taxed as candy at all. It is not candy and it is not so taxed."

65 "Mr. REED. I thank the Senator. I am perfectly content to have the law stand as it is; but if we are going to vote on the other proposition, I would like to have it voted on in the manner I have suggested."

I might say, sir, that Senator Reed had suggested an amendment to the committee amendment. Further on, in the same debate and reported on the same page, Senator Willis made this inquiry:

"Mr. President, I desire to ask the Senator from New York a question. I do not desire to be misunderstood in my attitude on this. I am in favor of the reduction of this tax, but what I can not understand is why the Senator's committee now proposes to make a larger comparative reduction in the higher grades of candy than is proposed for the lower and cheaper grades of candy. Why should that be done?

"Mr. CALDER. Mr. President, in the committee I voted for the three per cent. tax on all candies. I never agreed that ten per cent. was wise, and I do not now, and in line with the statement of the Senator from Massachusetts (Mr. Walsh), in my opinion, it would be inequitable and would work a great hardship on the higher and better grades of candy if the ten per cent. tax is levied.

"Mr. MCLEAN. I call the attention of the Senator to the prime reason why those of us who are opposed to that amendment thought we ought not to tax the higher grades of candy. For instance, sweet chocolate is not taxed at all, but it comes in competition with chocolate candy, it answers practically the same purpose, so we felt that it was unfair to tax the chocolate candy and let the sweet chocolate monopolize the market.

"Mr. CALDER. That is another excellent argument.

"Mr. MCLEAN. I think that is the prime reason.

"Mr. REED (from Missouri). Mr. President, it seems to me there is a peculiar dearth of argument here or else a plentitude that is so massive that I cannot grasp it. The first appeal was for sweet chocolate for the soldiers who had marched in France some three

66 years ago. That necessity does not exist any more. Now it is discovered that sweet chocolates are not taxed at all.

"Next we heard about the poor clerks and stenographers, who had to make their dinners off of it, and now an appeal that would wring tears from the eyes of a marble statue is made for the poor fellow who has had his whiskey taken away from him and is about to have his candy taxed. What a heart-rending thing it is when one contemplates it! Here is an old jag walking down the street, with his tongue dry, longing for the thing that has passed away apparently forever, who goes into a candy store and buys a pound of candy which costs twenty cents, and which is taxed six mills, and that is to close the curtain on the window of his happiness, and he is to see the sunlight of joy no more. That is a funny argument."

In the course of the Senate hearing, sir, and the House, further debates took place, which we do not need to offer, because the next and substantially the important fact, showing the contentions made for the reduction of the tax on candy from the proposed tax to the tax, which was subsequently made, of three per cent. in 1921, instead of five per cent. in the act of 1918, and showing how, as part of the history, that one of the controlling reasons that appears to have influenced the Senators in reducing the tax upon candy, was this contention, that other things did not bear the tax at all.

(The court here announced a recess of ten minutes.)

(The court, at 12:10 o'clock p. m., thereupon reconvened.)

Mr. MASON. Now, sir, we would like to follow the legislative history another step by offering in evidence, certified by the clerk of the Committee on Ways and Means, "Notes on the Revenue Act of 1918, submitted by the Secretary of the Treasury, without recommendation at this time," is the way in which the pamphlet is entitled.

The COURT. What is it, his message to the Ways and Means Committee?

67 Mr. MASON. His submission to the Ways and Means Committee on November 3, 1919, addressed to the chairman of the Committee on Ways and Means, Honorable Joseph W. Fordney, for the purpose of embracing in the history of the act of 1921 so much of the suggestions which, as the Secretary of the Treasury says, are not at that time recommendations as appear on page 34, in relation to section 900, subsection (9), tax on candy, reading as follows:

"This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.

"It has been suggested that the term 'candy' should be defined.

"The following definition of the term 'candy' is suggested:

"Strike out subdivision (9) and insert:

"Candy, 5 per centum. Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruits and nuts not specified in paragraph (b) of this subdivision, pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, sweetened licorice not taxed as cough drops under section 907, sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake, and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, nor glace or candied fruits purchased for and

used in the manufacture of food products, such as ice cream, cakes, and pastries."

(Paper in question marked "Plaintiff's Exhibit 11.")

68 Mr. MASON. Then, we call your honor's attention and suggest the inclusion in the record of the provision of the act of 1921, as passed, Title IX, excise taxes, section 900, reading: "That from and after January 1, 1922, there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold or leased: Subsection VI, candy 8 per centum."

The COURT. That is the same as the act of 1918?

Mr. MASON. Exactly the same as the act of 1918, without the addition of the suggested definition which Secretary Glass said had been proposed, and without anywhere in the act of 1921 imposing a tax upon sweet chocolate or sweet milk chocolate, or using the general language to include such related subjects in the term of candy or any other taxed substance under the act.

For the purpose of showing the intent of Congress in the use of the word "candy" and as an easy way of bringing previous legislation to your honor's attention, we have prepared here a legislative history beginning with the tariff act of August 10, 1790, showing the use of the words "candy," "chocolate," "sweet chocolate," and "sweet milk chocolate" by Congress; from that time down to the tariff act of September 21, 1922, including not only tariff acts but internal revenue acts, such as the war acts of the 1860's, and one of the later statutes combining the revenue and tariff provisions, and we submit it to your honor in this printed form, and suggest that in that form, for easy reference, it be added to the record. Of course, it is not necessary to offer in evidence acts of Congress, but as it happens to be an easy method of substituting a few pages for many volumes, we suggest that in the printed form, in which it is now presented to the court, that it be added to the record, without being copied by the stenographer. We will furnish sufficient printed copies to take of the record in each case. I understand that that is not objected to by counsel. It will make it a little bit easier for you.

69 Mr. WILSON. No.

Mr. MASON. In line with the last suggestion, sir, and to make of easy access the content of the standards of purity of food products, which have been offered in evidence in bulk, we have excerpted the relevant parts of the various documents and put them in the same form that we will put the acts of Congress, and we will furnish to your honor, and for record purposes, printed copies of those also. Those show from the various circulars and decisions of the department heretofore offered, the definition and standards of candy and chocolate, sweet chocolate, and sweet milk chocolate in parallel columns, showing the way in which the department has handled it.

Mr. WILSON. Of course, our objection goes as to the materiality of that.

Mr. MASON. It is conceded that any objection that the Government has made to the documents in full would, of course, attach to this excerpted copy from those documents, and which is not intended as additional evidence. It is intended as an easy way of ascertaining what is in the original.

(Two papers in question marked "Plaintiff's Exhibits 12 and 13, respectively.")

Mr. MASON. That is the plaintiff's case in chief, and I may say at this time in view of the fact that it was impossible for counsel for the Government and counsel for the plaintiffs to know just exactly how the case might move as to time, or just how far we would get on to-day, I have agreed with counsel for the Government that the Government witnesses might not be called until to-morrow, and for that reason they may not be here, and if they are not here, with your honor's permission, I will consent to an adjournment of the case until to-morrow morning, so that they may be ready.

Mr. WILSON. If the court please, our witnesses are practically all experts, and if we wanted to call them to-day they would
70 not be ready. Subpœnas have gone out and they will not be here until to-morrow, so, with the permission of the court, we will ask that we adjourn until to-morrow.

The COURT. That is perfectly agreeable to me. Do you think that you will be finished to-morrow?

Mr. WILSON. It will be agreeable for us to start a little earlier.

The COURT. I do not like to burden counsel because frequently you want to take care of your correspondence, but, so far as I am concerned, nine o'clock is absolutely satisfactory.

Mr. MASON. If it suits my associates, it suits me.

The COURT. If you are all agreed, we will start at nine o'clock.

Mr. MASON. We are quite satisfied here. Your honor asked if the case would be concluded to-morrow. I would be hopeful that it would be. We have a number of witnesses for rebuttal, that we may not be able to put on.

The COURT. I do not believe I will be able to sit on Wednesday. There is just one thing I am expecting, a telephone call that may or may not require me to go back to Easton to-night. If I have to go back to Easton to-night, who shall I notify in that event?

Mr. MASON. If your secretary will notify me, I will notify my associates. I will so arrange that all my associates are notified.

(Adjourned until Tuesday, May 22, 1928, at 9.00 o'clock a. m., daylight saving time.)

Evidence on behalf of defendant

SECOND DAY

Philadelphia, Pa., Tuesday, May 22, 1928, at 9.00 o'clock a. m., eastern daylight saving time.

Mr. WILSON. Before opening the defense, your honor, I would like to make a very brief preliminary statement as to the theory on which the defense is proceeding.

71 The COURT. You want this for the record?

Mr. WILSON. Please.

The COURT. All right.

Mr. WILSON. As stated by me yesterday, the Government contends that the Commissioner of Internal Revenue had full power and authority to make his definition of "candy"—that word having been used in the internal revenue acts of 1918 and 1921—providing such definition was reasonable and reasonably applicable to the subject.

At this time I would like to read into the record the definition promulgated by the Commission of Internal Revenue, and under which the taxes herein involved were collected. This definition was promulgated originally on May 1, 1919, by the Secretary of the Treasury, and is referred to as article 22 of the regulations. It originally read as follows——

Mr. MASON. Before you read it, may I ask, for the purpose of the record, whether Mr. Wilson intends to give the basis for that regulation at this time, in view of the fact that in another case the Government did give the basis for it, as the definition suggested by the National Confectioners Association, on behalf of the candy manufacturers, and that was its origin and that was the source from which the Commissioner of Internal Revenue obtained the basis for his definition?

I was wondering if that is to be offered in the record as part of the defendant's case, whether at the same time it ought not to have the history of it and the source of it, but that is for Mr. Wilson.

Mr. WILSON. Of course, the position of the Government in all of these cases is that the origin and the basis of this definition are wholly immaterial in these cases. We are proceeding on the theory that it is a legal, reasonable and just regulation, promulgated under the authority duly vested in the Commissioner of Internal Revenue, and that the definition, as originally worded, and as amended, is all we are interested in at this time.

The definition reads as follows, or read as follows:

72 "Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, losenges, taffies, candy kisses, wafers, fudges, Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits, and nuts, glacé or candied fruits and nuts, pop corn and other cereals and cereal products mixed or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate-covered marshmallows, candy cough drops, and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, and all similar articles, however designated. It does not, however, include cereal breakfast foods, cake and pastries, nor bitter chocolate which

needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon, or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer, and on which he has performed no further process of manufacture, the tax attaches only to such portions of the goods sold as have been manufactured by him."

On May 10, 1919——

The COURT. What was the date of the definition?

Mr. WILSON. The original definition was May 1, 1919. That is promulgated as article No.—I believe that will be article 22 under the Regulation 45.

Mr. MASON. Forty-seven.

Mr. WILSON. On May 10, 1919, there was a ruling made by the commissioner, which I shall read. It is very brief.

73 "Sweet chocolate sold in parcels of such a size and shape that it is commonly purchased and consumed as candy by the general public, is taxable as candy, but sweet chocolate sold in large packages, not as candy, but intended for further manufacturing purposes, is not taxable, provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes."

Now, article 22 was revised in December, 1920, to the extent that while still covering permanently sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, by the introduction of another paragraph excluded—

"Sweet chocolate, glace or candied fruits or nuts sold by the manufacturer used under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold."

So that the addition to or the amendment of the original definition did not affect sweet chocolate and sweet milk chocolate, except as to the forms sold where further manufacture was necessary or done.

Mr. MASON. Mr. Wilson, may I ask whether you are offering the ruling of the commissioner, as of May 10, 1919, as a regulation authorized by the statute?

Mr. WILSON. In answer to the inquiry of counsel, with regard to the ruling of May 10, 1919, which I quoted——

The COURT. What was the inquiry?

Mr. MASON. I inquired as to whether or not Mr. Wilson was offering the ruling of the Commissioner of Internal Revenue of May 10, 1919, as an authorized ruling of the Treasury Department, or as a mere interpretative opinion of the commissioner. If it is offered as 1st, then I want to object because it is not an authorized ruling of the Secretary, and if the second, I will object to it because it has not the weight of the commissioner's opinion.

Mr. WILSON. It will be offered under the second designation of counsel. In other words, what we offer is an office ruling.

74 Mr. MASON. My reason for making that distinction at this time is because the act of 1918, section 1309, and the act of 1921, section 1308, gave, in these words, the only power that the department had to make regulations "That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act." There is no provision in either act permitting the Commissioner of Internal Revenue or the Secretary of the Treasury to make a definition of an article taxed by Congress.

The COURT. What was the original regulation?

Mr. MASON. The original regulation was section 22 of article 47, under the act of 1918, which was issued by the commissioner with the approval of the Secretary. That was authorized by the Secretary, but there is no foundation in the act for a ruling by the commissioner in the nature of a definition of the word "candy."

Mr. WILSON. Reference was made on several occasions yesterday by counsel, while reading from papers and documents introduced in evidence by him, to a certain case in Massachusetts, in which a decision for the plaintiff company had been entered shortly prior to the discussions which were taking place in the House and the Senate relative to this particular measure. The following remarks will be off the record.

(Remarks off the record.)

If your honor please, the proof to be offered by these witnesses will be in a limited field. Under the theory in which the defense is proceeding in these cases, we expect to offer proof showing how the products of these companies are purchased from factories, how they are handled through the wholesale confectioners, and from them to the retail confectioners, and from them sold to the consumer. That is all the proof that we are going to have. We are contending that these products are candies, and we are going to offer proof to the effect that they are handled in conjunction with other candies, handled as candies and considered as such by the trade and by the consumer.

75 The COURT. They are sold in candy stores and by candy sellers.

Mr. WILSON. Surely.

Mr. MASON. Of course, the proof as to the physical acts of manufacture, and packing and the identity of the individuals to whom

sold could not be objectionable at all. We do object, however, to any proof from witnesses in an effort to establish that sweet chocolate and sweet milk chocolate are sold as candy, or with candy, or to persons also buying candy, because, to my mind, that is totally irrevelant to the issue which is here. The issue, which is here, is whether or not when Congress used the word "candy" that "candy" extended to include a totally different, well-known, and highly defined article such as sweet chocolate, and that any evidence of the nature outlined by the offer of proof would be merely evidence of persons who would describe facts going to show what has been outlined, and, if shown, would be of no aid to the court, and certainly of no effect as a fact on which to found a judgment of sweet milk chocolate as candy.

The COURT. Are you going to offer evidence to show what the composition of this chocolate is?

Mr. WILSON. If the court please, that is a matter entirely within the knowledge of the plaintiff, and the Government has not had the products analyzed. We can say that we know just in a general way, of course, but as to the exact percentages we can not say at this time.

Mr. MASON: Our thought has been and would be, sir, that the varying quality of products would also be immaterial if the Government were to offer it.

The COURT. I merely inquired whether the proof——

Mr. MASON. I am just carrying the thought, until the product is changed and it is no longer just sweet chocolate or sweet milk chocolate. The Government has admitted that articles taxed and on which the tax was paid, for which these suits have been brought to recover what has been paid, are either sweet chocolate or sweet milk chocolate, and going back to the facts, that are already
76 of record here, we have a well-known article, sweet chocolate, a well-known article, sweet milk chocolate, both of which have received a classification, identification, and definition by the authorized arm of the Government through the Secretary of Agriculture and through Congress itself in its legislative history of the tariff and referred to in the acts going all the way through from the year 1790. Therefore, it is our thought, sir, that such evidence as the Government has indicated it desires to offer from these witnesses would be interesting, but not relevant to the issue that is here.

Mr. WILSON. If the court please, counsel's statement made a moment ago to the effect that the Government admits—to the effect, at least, that the products manufactured by these companies were sweet chocolate or sweet milk chocolate is true, to this extent: The allegations of the various statements of claims in these cases allege that the plaintiffs during certain periods of time manufactured and sold certain sweet chocolate and sweet milk chocolate in various

forms and sizes. Now, a chocolate cream is a form of sweet milk chocolate, if you want to call it that.

Mr. MASON. Oh, no.

Mr. WILSON. Of course, we have no evidence here. The plaintiffs have taken upon themselves the assumption of the obligation of any testimony. So far as we know, up to the present moment, these products were sweet chocolate and sweet milk chocolate in different forms and sizes. That is all we know about it. So, when you attempt to talk of sweet chocolate or sweet milk chocolate, as referred to by the Department of Agriculture, where the Department of Agriculture was talking about the purity that a certain product had, so far as the quality was concerned to pass the pure food law, you are talking about an entirely different subject than we are. We are interested in a product that is made up of chocolate, sugar, and flavored in some instances with nuts, a finished product, as distinguished from the raw product, which is ground from the cacao bean. If so, we should not admit that the prod-
77 ucts here involved are sweet chocolate and sweet milk chocolate as referred to by the Department of Agriculture, because they are not.

The COURT. Really, the purpose of your offer is as to the form in which they are sold, and the places in which they are sold, and so on?

Mr. WILSON. Our theory is that these products, as manufactured, since they contain a special percentage of flavor, of nuts and cream, and whatever is put in them, and since they are sold to the candy trade, to the wholesalers, and sold by them to the retailers, and the consumers, they are within the meaning of the act of 1921 where the term "candy" is used.

The COURT. On that theory, leaving out any question of the regulations of either of the departments, if some product contained a sugar, nothing but sugar, made up in the exact form, and was sold to the candy dealers, sold as candy, on that theory that could be developed to show it was candy.

Mr. WILSON. I do not understand your statement. I am sorry.

The COURT. My thought, following that line and leaving out of consideration all of these regulations—suppose there were no regulations at all, and the question was whether sugar came under the head of "candy" at all, just plain candy and you would offer to prove that ordinary sugar lumps, made up in attractive form, animals, or something of that sort, and sold in candy stores, it would be candy within the meaning of that act.

Mr. WILSON. I would say, in answer to your honor, if ordinary squares of sugar, for instance, Domino sugar, were dolled up and fixed up in some attractive package, with labels on them, which would be appropriate to a confection in which sugar was carried, and sold in competition with, but also as candy, I would say they were also within the meaning of the act.

(Recess was here taken until 10.15 o'clock a. m.)

78 LOUIS NEWHOFF, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. Where do you reside? Where do you live?
A. 1826 South Broad Street.
Q. In Philadelphia?
A. In Philadelphia.
Q. In what business are you engaged?
A. Confectionery.
Q. Confectionery?
A. Yes.
Q. And where is your place of business?
A. 255 Market Street.

Mr. MASON. Mr. Wilson, do I understand that Mr. Newhoff has been called for all four cases?

Mr. WILSON. For the Hershey case.

By Mr. WILSON:

Q. How long have you been engaged in the confectionery business?
A. About thirty-two years.
Q. And what portion of that time have you been here; all the time?
A. In that section, about seven years.
Q. Seven years?
A. That's where I am located now.
Q. I mean in Philadelphia.
A. In Philadelphia all the time.
Q. Do you handle any of the products manufactured by the Hershey Chocolate Company, of Hershey, Pennsylvania?
A. Yes, sir.
Q. For how long a time have you handled those products?
A. Since I have—well, it would be about the same time, I believe; something about twenty-five or thirty years, between that time, because when I started in business, Hershey wasn't in the chocolate business then; just about twenty-five or twenty-seven years, something like that.
Q. What of the Hershey products do you carry?
A. We carry practically the complete line.

79 Q. And what, so far as you can recall now, are the names of some of their products?

A. Well, they are making milk chocolate, making chocolate almond bars, and different other items, but they are all chocolate goods.
Q. They are all chocolate goods?
A. They are all chocolate goods.
Q. You have said that you are in the confectionery business?
A. Yes, sir.

Q. What trade do you supply?
A. We supply the candy stores and drug stores.
Q. Candy and drug stores, generally?
A. Yes, and probably the grocery stores. You know they are handling the goods.
Q. You supply those lines of business with the Hershey products, do you?
A. I do.
Q. Where do you buy the Hershey products?
A. I get them direct from Hershey.
Q. From the factory?
A. From the factory.
Q. How are those products handled by you?
A. Well, as chocolate.
Q. As chocolate?
A. Right.
Q. Your place is advertised as what?
A. As a confectionery.
Q. You handle that stuff as chocolate confectionery, do you?
A. We handle the confectionery line, but there are different varieties in confectionery, but anybody can come in and ask for the particular item. For instance, if they ask for chocolate, I am going to give them chocolate.
Q. Your line, however, is limited to confectionery of all kinds?
A. Of all kinds.
Q. You supply the confectionery trade?
80 A. Exactly.
Q. Do you know, of your own knowledge, whether wholesale confectioners in this community, generally, handle Hershey products? Do you know, of your own knowledge, whether they do?
A. Why, naturally. I believe the majority of jobbers in the confectionery line handle Hershey goods. It is a very prominent item.
Q. You know a great many who do?
A. Sure.
Q. And those products are handled by those men in the confectionery department—in the confectionery field?
A. Yes, sir.

Cross-examination by Mr. MASON:

Q. Do you handle nuts of any kind? Do you handle salted nuts?
A. We do.
Q. And do you handle salted peanuts?
A. We do.
Q. Salted almonds?
A. Not exactly. The most we do handle are salted peanuts.
Q. And those are handled in the confectionery trade?
A. Some will handle them, and some will not handle them.
Q. You, yourself, do handle them?
A. I do.

Q. Do you handle dates?
A. No; we do not.
Q. Do you handle stuffed dates of any kind?
A. Sometimes, but not all the time. I don't consider it as an item.
Q. Do you handle prunes of any kind?
A. We do sometimes.
Q. Do you handle candied fruit of any kind?
A. What do you mean by "candied fruit"?
Q. What kind of candied fruit do you handle?
81 A. We would say "candy fills." That would be different kinds of fruit. We do handle them.
Q. Do you handle raisins of any kind?
A. We do.
Q. There is quite a large demand for raisins in the confectionery trade, is there not?
A. Well, it is quite a seller.
Q. And raisins are put up in small boxes, and they are eaten by various people who buy them in the boxes, are they not?
A. Yes, sir.
Q. Do you handle what are called "chocolate covered crackers"—the various confections that are put out by the bakers?
A. Yes, sir; I do.
Q. Those small cakes——
A. Yes; they are put up in five cent packages, chocolate coated; yes, sir.
Q. I am wondering if you also handle those various small toys, balloons, nicknacks of that sort?
A. Well, that is no item; just——
Q. Just a side line?
A. Just on the side.
Q. But you sell them to the confectionery trade, do you not?
A. Oh, yes. I don't know who is buying them, whether it is confectioners or retailers.
Q. The small stores?
A. Yes, sir.

By the Court:

Q. That is, you sell them?
A. We do.

By Mr. Mason:

Q. Mr. Wilson asked you whether the wholesale confectioners handle Hershey's sweet chocolate and sweet milk chocolate.
A. Yes, sir; they do; oh, yes.
82 Q. The tobacco stores also handle Hershey's products, do they not?
A. Yes; they do.
Q. And the wholesale drug jobbers handle Hershey products?
A. Yes; they do.

Q. And the wholesale grocery jobbers handle Hershey products, do they not?

A. Yes, sir.

Q. And what they handle and what you handle are Hershey's sweet chocolate and sweet milk chocolate?

A. Exactly.

Redirect examination by Mr. WILSON:

Q. Your main lines in your store are candies; that is what you mean?

A. Why, the general line.

Q. You are in the candy business, the wholesale business?

A. The wholesale business.

Mr. WILSON. I want to pursue the same line of examination in regard to the Wilbur products.

Mr. MASON. I understand the witness is now being examined in the Wilbur cases. Do you agree, Mr. Wilson, that this testimony will apply to all of the cases?

Mr. WILSON. All right, that will be very agreeable.

Mr. MASON. It is agreed by counsel for the plaintiffs and counsel for the Government that the testimony just given by the witness in relation to the Hershey cases shall apply to the other three plaintiffs, and that it is to be assumed that it would be the same in relation to the sweet chocolate and sweet milk chocolate manufactured and sold by the other three plaintiffs as it has been in relation to the Hershey sweet chocolate and sweet milk chocolate, and that his cross examination and his answers therein would be the same.

Mr. WILSON. That is all, Mr. Newhoff.

83 ISRAEL MARGOLIS, having been duly sworn, was examined and testified as follows:—

By Mr. WILSON:

Q. You are a resident of Philadelphia?

A. Yes, sir.

Q. Are you in business here?

A. In business in Philadelphia; yes, sir.

Q. And what is the name of your business?

A. We are operating under the name of "Candy Headquarters."

Q. Where is your store?

A. 117 Market Street.

Q. Are you in the wholesale business or retail business, or both?

A. Both.

Q. How long have you been engaged in that business here in Philadelphia?

A. Well, about thirteen or fourteen years.

Q. In Philadelphia?

A. In Philadelphia, in that business.

Q. Does your company carry any of the chocolate products manufactured by the Hershey Company at Hershey, Pennsylvania?

A. Yes, sir.

Q. Can you tell us the names of some of those products?

A. Hershey milk chocolates, Hershey almond bars, Hershey milk chocolate kisses.

Q. Do you carry the bars in different sizes?

A. Five and ten cent, and half pound cakes.

Q. And how long have you carried those products?

A. Ever since I have been selling candy; that's twelve or thirteen years.

Q. And do you sell anything other than candy?

A. Yes, sir.

Q. You do?

A. Yes, sir.

Q. What other things do you sell other than candy?

A. We sell tobacco, ice cream supplies, fountain supplies, and sell novelties.

84 Q. From whom do you buy your Hershey products?

A. From the Chocolate Sales Corporation, of Hershey, Pa.

Q. You buy direct from the manufacturer?

A. Direct from the manufacturer; yes, sir.

Q. How are those products handled by you; as what?

A. As chocolate; sold as chocolate.

Q. Your tobacco and your sub-items that you mentioned a moment ago, do you handle those wholesale, or retail, or both?

A. Wholesale only.

Q. And you handle candy?

A. Yes, sir.

Q. And included in that is chocolate candy?

A. Yes, sir.

Q. Who do you supply?

A. Well, jobbers, cigar stores, drug stores, groceries, stands—outside stands and indoor stands.

Q. Candy stores?

A. Candy stores; yes, sir.

Q. You do not handle any groceries, do you?

A. No, sir.

Q. You say the name of your place is the "Candy Headquarters"?

A. "Candy Headquarters"; yes, sir.

Q. And in addition to candy, you handle tobacco and sell other supplies?

A. Yes, sir.

Cross-examination by Mr. MASON:

Q. As I understand it, your business is jobbing various small articles, is it not?

A. Yes, sir.

Q. And you have told us that you handle tobacco goods?

A. Yes, sir.

Q. Does that mean cigarettes and chewing tobacco?

A. Cigars, cigarettes, and smoking tobacco.

85 Q. Do you handle chocolate and raisins?

A. Yes, sir.

Q. That is, sweet chocolate and sweet milk chocolate?

A. Yes, sir.

Q. And you sell chocolate almond bars?

A. Yes, sir.

Q. The almond bars that you handle are the same as the sweet milk chocolate, except they have a few almonds in them?

A. A few almonds in them.

Q. You handle, I think you said, certain small articles for the drug stores?

A. Not drug supplies.

Q. You handle cough drops, do you not?

A. Cough drops; yes, sir.

Q. You handle certain soda supplies?

A. Yes, sir.

Q. You handle mint of various kinds?

A. Yes, sir.

Q. And you handle candies?

A. Yes, sir.

Q. And you handle chewing gum?

A. Yes, sir.

Q. And you handle stuffed dates, do you?

A. Chocolate coated dates.

Q. And you handle salted nuts of all kinds?

A. Salted nuts; yes, sir.

Q. What kind of small toys do you handle?

A. We handle balloons, we handle rubber balls; like clay pipes, and sell trinkets.

Q. All kinds of trinkets of that sort. As a matter of fact, you might say it would cover all the articles that would be available in the five and ten cent trade, would it not; a large part of it?

A. Penny, five and ten cent trade; yes, sir.

Q. And in the five and ten cent trade you include the raisins that have been spoken of here; that is, the small boxes of raisins?

86 A. Yes, sir; we handle them.

Q. I wonder do you handle the small cakes, confections of that sort?

A. We handle peanut butter sandwiches, cheese sandwiches, fig sandwiches, in five cent packages.

Q. Do you handle these small cakes that are covered with chocolate?

A. Yes, sir; we handle those.

Q. All things of that kind?

A. Yes, sir.

By the COURT:

Q. Eskimo pie?

A. Eskimo pie; no, sir; that's not chocolate; that's ice cream.

Redirect examination by Mr. WILSON:

Q. In your store the candies, the greater part, are on the shelves, against the wall, in boxes of different kinds, or where do you keep them?

A. On the shelves.

Q. The Hershey stuff and all the other candies belong on the same shelf, together?

A. Together.

Recross-examination by Mr. MASON:

Q. Wait just a minute, because Mr. Wilson is testifying. As I understand it, you have your various goods divided up into departments, so that you will know what you have got in stock, have you not? You do not have them——

A. Pardon me, do you want me to explain?

Q. Yes.

A. I wouldn't place a box of cigars with a box of chocolate in the one bin.

Q. Certainly not.

A. But it is only one store.

87 Q. But what you do is to separate, in a general way, the various articles that you have there, so that you will know what you have there?

A. Yes.

Q. And in one place you keep your sweet chocolate and your sweet milk chocolate, and in another place you keep your raisins, and in another place you keep your tobacco, and in another place you keep your hard candies, and your various kinds of candies?

A. Sure.

Q. That is all separated in a proper way?

A. So we will know where to lay our hands on it.

Q. Do you handle Klein's?

A. Klein's chocolate; yes, sir.

Q. Do you handle the York chocolate?

A. No, sir; we don't handle it one time.

Q. You did handle it at one time?

A. As far as I can remember, I don't think we did.

Mr. MASON. Then, it is agreed that the testimony of Mr. Margolis will be taken to apply to the Wilbur cases, and the Klein cases, with the same force and effect as it applies to the Hershey cases.

Mr. WILSON. If the court please, that is all the testimony from the defense at this time.

I neglected at the time the Hershey exhibits were introduced to offer in evidence the similar advertising and wrappers of the Wilbur Company, which we would like to offer in evidence at this time.

There being no objection to the offer, the offer is as follows; these are the exhibits in the Wilbur cases:

"1-W" will be container for Wilbur's sweet milk chocolate pats;
"2-W" will be advertising card for Wilbur buds;
"3-W" the same, advertising card for Wilbur buds;
"4-W" is the same; advertising card for Wilbur buds;
"5-W" and "6-W" and "7-W" will come under the same classification; cards or advertising slips of Wilbur Buds;
88 "8-W" will be the same;
"9-W" and "10-W" are advertising sheets of buds.

The defendant rests, your honor.

Mr. Mason. If your honor please, the plaintiffs will also rest, so that the record is now complete for your honor.

(Argument set for Thursday, June 7, 1928, at 10.00 o'clock a. m., daylight saving time.)

And thereafter counsel for the plaintiff and counsel for the defendant respectively made requests of the said court for findings of fact and conclusions of law, which requests for findings of fact and conclusions of law respectively were as follows:

89 *Plaintiff's request for finding of fact and conclusions of law*

[Title omitted.]

FINDINGS OF FACT

The plaintiff, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:

1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business in the city and county of Philadelphia in said State, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the collector of internal revenue of the United States of America for the first district of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located.

3. During the period from July 1, 1921, to December 31, 1921, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $634,651.33.

4. The collector of internal revenue, the defendant above named,
90 purporting to act under and by virtue of the authority of section 900, Title IX, of the revenue act of 1918, did during the period aforesaid assess excise taxes against the plaintiff aggregating $30,188.40.

5. During the period from January 1, 1922, to March 31, 1924, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $2,953,181.14.

6. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of section 900, Title IX, of the revenue act of 1921, did during the period aforesaid assess excise taxes against the plaintiff aggregating $[illegible]4,193.42.

7. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States the plaintiff made a return of the said sales of sweet chocolate and sweet milk chocolate heretofore referred to involuntarily and under protest, and at the times hereinafter set forth did involuntarily and under protest pay to the defendant, as collector of internal revenue as aforesaid, a tax of $124,331.82, as follows:—

Date paid	Amount	Date paid	Amount
Aug. 31, 1921	$2,217.65	Jan. 29, 1923	$2,722.40
Sept. 29, "	4,857.29	Feb. 24, "	260.98
Oct. 31, "	6,223.62	" 27, "	2,915.16
Nov. 30, "	6,984.11	Mar. 28, "	2,552.15
Dec. 29, "	5,676.62	Apr. 30, "	3,042.53
Jan. 30, 1922	4,199.11	May 31, "	2,519.12
Feb. 28, "	2,561.17	June 29, "	2,902.53
Mar. 31, "	2,335.84	July 31, "	1,920.29
Apr. 1, "	2,087.35	Aug. 31, "	1,808.59
" 18, "	60.07	Sept. 30, "	2,781.79
" 29, "	2,814.32	Oct. 31, "	3,274.60
May 31, "	2,183.86	Nov. 30, "	5,176.37
91 June 28, 1922	2,464.62	Dec. 31, "	3,915.99
July 31, "	1,662.71	Jan. 31, 1924	3,330.68
Aug. 16, 1922	142.87	Feb. 29, "	3,591.23
" 30, "	1,682.48	Mar. 31, "	3,417.22
Sept. 19, "	4,377.62	Apr. 30, "	3,041.00
" 27, "	264.85	May 31, "	2,606.12
" 30, "	2,661.70	June 30, "	2,785.23
Oct. 31, "	4,333.13	July 31, "	2,067.12
Nov. 28, "	3,756.87	Aug. 30, "	349.82
Dec. 20, "	235.85		
" 29, "	2,987.78		124,331.82

8. The act of Congress of June 3, 1902, and supplements, 92 authorized the Secretary of Agriculture to establish standards of purity for food products and to classify the same. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such statutory authority, are the official standards of such food products for the United States of America.

9. The standard of purity for food products established by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture and contain the following:

(Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products"

"c. Cacao Products"

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contain not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fibre, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

93 "6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fibre or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

10. The standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under which classification is included "candy," and the said standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "candy."

11. There is no authority vested by act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America.

12. The plaintiff, in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed a claim for refund, to wit, of the sum of $38,074.39, tax erroneously and illegally collected for the period from May 1, 1921, to December 31, 1921, of which sum $7,935.99 represented payment made to Ephraim Lederer, formerly collector of internal revenue of the first district of Pennsylvania, and $30,138.40 was paid to the defendant above named. The plaintiff also filed its claim for refund to it of the sum of $94,193.42, tax erroneously and illegally collected, all of which was paid to the defendant above named.

94 On or about November 17, 1925, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the said claims for refund of $38,074.39 and $94,193.42 respectively, were rejected.

13. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

14. Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

15. Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

16. Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product.

17. Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug.

95 18. Since the Act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy.

19. Sweet chocolate and sweet milk chocolate are not candy.

CONCLUSIONS OF LAW

The plaintiff requests the court to make the following conclusions of law:—

1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

2. The revenue act of 1921, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921.

4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant.

5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest.

A. Allen Woodruff,
Wm. Clarke Mason,
Attorneys for Plaintiff.

96 *Defendant's request for findings of fact and conclusions of law*

[Title omitted.]

FINDINGS OF FACT

The defendant, considering the facts hereinafter set forth to be proven, requests the court to find the same as follows:

I

The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business in the city and county of Philadelphia in said State, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

II

The defendant at all of the times hereinafter mentioned was the collector of internal revenue of the United States of America for the first district of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located.

III

During the period from July 1, 1921, to December 31, 1921, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $634,651.33.

97 IV

The defendant above named, acting under and by virtue of the authority of section 900, Title IX, of the revenue act of 1918, did during the period aforesaid, collect excise taxes from the plaintiff aggregating $30,138.40.

V

During the period from January 1, 1922, to March 31, 1924, both inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of $2,953,181.14.

VI

The defendant above named, acting under and by virtue of the authority of section 900, Title IX, of the revenue act of 1921, did during the period aforesaid, collect excise taxes from the plaintiff aggregating $94,193.42.

VII

The plaintiff, in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed a claim for refund, to wit, of the sum of $38,074.39, tax so collected for the period from May 1, 1921, to December 31, 1921, of which sum $7,935.99 represented payment made to Ephraim Lederer, formerly collector of internal revenue of the first district of Pennsylvania, and $30,138.40 was paid to the defendant above named. The plaintiff also filed its claim for refund to it of the sum of $94,193.42, so collected, all of which was paid to the defendant above named.

Plaintiff was thereafter notified that the said claims for refund were officially rejected by the Commissioner of Internal Revenue.

98 VIII

The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

CONCLUSIONS OF LAW

The defendant requests the court to make the following conclusions of law:

I

The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

II

The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

III

The defendant is entitled to judgment.

GEORGE W. COLES,
United States Attorney, Attorney for Defendant.

99 And thereafter, to wit, on November 22, 1928, the said court filed an opinion embodying findings of fact and conclusions of law which follows (in the form revised by the court as indicated by the opinion of January 17, 1929) viz:

Opinion of the court

Filed Nov. 22, 1928.

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania.

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also con-

ceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "Solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds,"
101 "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under the act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court
102 for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Con-

gress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual Members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of cannot be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judically settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two
103 statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section" and "Unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery," and "chocolate." In the war revenue act of 1866 they are "sugar candy," "all

confectionery made wholly or in part of sugar," and "chocolate a cocoa prepared." These references are sufficient to indicate the po involved. Most of these statutes disclose the same general schem viz, a provision for candy, then a provision for all confectionery n specially provided for, and then a special provision for chocola sometimes referred to as "sweetened," sometimes as "prepared," a sometimes without qualification.

The principle of statutory interpretation contended for by t plaintiff was stated and applied in DeForest v. Lawrence, 13 Ho ard 274, in which case the Supreme Court said: "* * * Fo when Congress, in legislating on the subject of duties, has describ an article so as to identify it by a given designation for reven purposes, and this has been so long continued as to impress on it particular designation as an article of import, then it mu
104 be treated as a distinct article, whether there be eviden that it is so known in commerce or not * * *." To th same effect is Reiche v. Smythe, 13 Wallace 162, and other cas

These decisions announce a well-established general principle statutory interpretation, and I do not think that their applicabili can be questioned upon the ground that the rule is confined to th interpretation of tariff acts. Nor do I think that it can be succes fully argued that prior tariff acts may not be considered in the inte pretation of revenue acts. While these two classes of statutes a not strictly in pari materia, nevertheless they are closely relat and have frequently been considered together for purposes of inte pretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Co tro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 1 U. S. 655.

Concluding, therefore, that this branch of the plaintiff's argume is a correct statement of a general canon of statutory interpretatio and that it is properly applicable to the case at hand, we may lea it for the moment. The principle involved can not be discarde but must be taken into consideration in reaching a final decision, b how far it is to control that result will depend upon further co siderations presented by the record which will now be taken u

It is always to be kept in mind that a statute is not to be rea as though open to construction as a matter of course. Where th language is plain and the terms used are free from ambiguity an uncertainty, the court should not look for a meaning beyond th terms of the statute itself. "It is elementary that the meaning o a statute must, in the first instance, be sought in the language i which the act is framed, and if that be plain, and if the law i within the constitutional authority of the lawmaking body whic passes it, the sole function of the courts is to enforce it accordin to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. [illegible] 242 U. S. 470, 485. A corollary to the general principl
105 just stated is the presumption that words of general popul usage are used in their ordinary sense and with the meanin

commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's Interpretation of Statutes, Sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various Acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Fumsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeals 404), and varying conclusions have been reached.

106 Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the Revenue Acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the first

Circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is
107 ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough

to entitle them to very great weight upon a question of statutory construction.

108 To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the Court:

W. H. KIRKPATRICK, *J.*

Simultaneously with the filing of the foregoing opinion and findings and conclusions the said court filed special findings and conclusions on the requests for findings of fact and conclusions of law as follows, viz:

109 *Findings of Fact*

[Title omitted.]

The court finds the facts as contained in plaintiff's requests for findings of fact, numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

CONCLUSIONS OF LAW

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the court:

W. H. KIRKPATRICK, *J.*

110 Upon motion of counsel for plaintiff the court thereafter ordered a reargument of the questions involved, which was had on December 4, 1928, and thereafter on January 17, 1929, the court filed the following opinion modifying and reaffirming the findings and conclusions heretofore made, viz:

Opinion Sur Reargument

Filed January 17, 1929

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court, in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company, stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 5 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

111 The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

II

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases.

"In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are, first, that the above manner of finding facts is not proper practice, and second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the
112 limits of proper practice in stating the fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by re-stating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plantiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States, handed down November 19, 1928, or one

day before the opinion in this case was filed, and, of course, not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say: "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect
113 of the opinion in that case to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all. The act there under consideration was a special act allowing a suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy," however, we have just the opposite situation. Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co., #94, October term, 1928) the general rule referred to is re-affirmed. The court said: "Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity, United States v. Goldenberg, 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not
114 refuses to consider the apparently limited uses of the word in other acts of Congress. That matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the latter considerations were the more important and controlling ones.

The conclusions reached in the opinion filed will not be changed.
By the court:

W. H. KIRKPATRICK, *J.*

And thereupon counsel for the said plaintiff did then and there except as set forth in the notes of the trial before the said court without a jury, and did then and there except to the findings of fact and conclusions of law made by the said court as follows, viz:

Plaintiff's exceptions

A. EXCEPTIONS TO THE FINDINGS IN THE OPINIONS OF THE COURT

1. The plaintiff excepts to the following finding in the revised opinion of the court:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The plaintiff excepts to the following finding in the revised opinion of the court:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The plaintiff excepts to the following finding in the revised opinion of the court:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The plaintiff excepts to the following finding in the revised opinion of the court:

"Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined."

5. The plaintiff excepts to the following finding in the revised opinion of the court:

"It is a word of every-day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and

to my mind a definition which narrows it so as to exclude the plaintiff's products is not a natural one."

6. The plaintiff excepts to the following finding in the revised opinion of the court:

"When we examine the revenue acts of 1918 and 1921, it
116 becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The plaintiff excepts to the following finding in the revised opinion of the court:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The plaintiff excepts to the following finding in the revised opinion of the court:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The plaintiff excepts to the following finding in the revised opinion of the court:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put, and the manner and places in which it is ordinarily sold."

10. The plaintiff excepts to the following finding in the revised opinion of the court:

"To sum up the whole problem, we have here on the one
117 hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The plaintiff excepts to the following finding in the revised opinion of the court:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same ques-

tion under the act of 1918, decided that sweet chocolate was properly taxable as candy."

12. The plaintiff excepts to the following finding in the revised opinion of the court:

"In view of what has been said the decision is reached that the collection of the tax was lawful."

13. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15, Oct. T., 1928, U. S. Supreme Court), to abrogate the well-established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be
118 the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

14. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15, Oct. T., 1928, U. S. Supreme Court), was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

3. EXCEPTIONS TO THE DENIAL OF PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT

1. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

2. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products and to the Congress of the United States."

3. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding
119 cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with

sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent. (12%) of whole milk solids in the finished products."

4. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance of substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

5. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

6. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

C. EXCEPTIONS TO THE DENIAL OF THE PLAINTIFF'S REQUEST FOR CONCLUSIONS OF LAW

1. The plaintiff excepts to the refusal of the court to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

120 2. The plaintiff excepts to the refusal of the court to affirm the plaintiff's second request for conclusion of law:

"2. The revenue act of 1921, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

3. The plaintiff excepts to the refusal of the court to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921."

which was denied by the court.

4. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

which was denied by the court.

5. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest."

which was denied by the court.

D. EXCEPTIONS TO THE COURT'S CONCLUSION OF LAW

1. The plaintiff excepts to the court's conclusion of law as follows:

191 "1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word 'candy' in the Revenue Acts of 1918 and 1921."

2. The plaintiff excepts to the court's conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

3. The plaintiff excepts to the court's conclusion of law as follows:

"3. The defendant is entitled to judgment."

And inasmuch as the said testimony, opinions, findings, and conclusions, so excepted to, do not fully appear upon the record, the said counsel for the plaintiff did then and there tender this bill of exceptions as aforesaid and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid judge at the request of the said counsel for the plaintiff did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 26 day of January, 1929.

W. H. KIRKPATRICK, *J.* [L.S.]

PHILADELPHIA, PA., *January 26, 1929.*

I hereby approve the above bill of exceptions as to form and agree that the same may be settled by the court, and I hereby accept service of notice of settlement thereof in accordance with the ruling of the court.

GEORGE W. COLES,
United States Attorney, for Defendant.

122 In United States District Court

[Title omitted.]

Pracipe to enter judgment

Filed April 22, 1929

To the Clerk, U. S. D. C., E. D. of Pa.:

Enter judgment in the above-entitled case in favor of the defendant and against the plaintiff in accordance with the revised opinion of the court filed January 22, 1929.

GEORGE W. COLES,
United States Attorney.

123 In United States District Court

WILBUR-SUCHARD CHOCOLATE CO., INC.,

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE

Judgment

Filed April 22, 1929

Before KIRKPATRICK, *J.*

And now, April 22nd, 1929, in accordance with the revised opinion of the court, filed January 22nd, 1929, and by præcipe filed, judgment in the above entitled case is hereby entered in favor of the defendant, and against the plaintiff, Wilbur-Suchard Chocolate Co., Inc.

By the court.

Attest:

E. G. JOHNSON,
Deputy Clerk.

124 In United States District Court

[Title omitted.]

Assignments of error

Filed May 17, 1929

Comes now the above-named plaintiff, the appellant herein, by its attorneys of record, and assigns as errors upon which it will rely, the following errors as having intervened in the record, proceedings, and judgment of the United States District Court for the Eastern District of Pennsylvania in the above-entitled cause, to wit:

1. The learned court below erred in the following finding in the revised opinion:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2 The learned court below erred in the following finding in the revised opinion:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty
125 years later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The learned court below erred in the following finding in the revised opinion:

"There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The learned court below erred in the following finding in the revised opinion:

"Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined."

5. The learned court below erred in the following finding in the revised opinion:

"It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The learned court below erred in the following finding in the revised opinion:

"When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise fea-
126 tures of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The learned court below erred in the following finding in the revised opinion:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The learned court below erred in the following finding in the revised opinion:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The learned court below erred in the following finding in the revised opinion:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold."

10. The learned court below erred in the following finding in the revised opinion:

"To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which in-
127 cludes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The learned court below erred in the following finding in the revised opinion:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918, decided that sweet chocolate was properly taxable as candy."

12. The learned court below erred in the following finding in the revised opinion:

"In view of what has been said the decision is reached that the collection of the tax was lawful."

13. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15—Oct. T., 1928, U. S. Supreme Court), to abrogate the well-established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

128 14. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15—Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

15. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time,

were products which had an identity well known to dealers in and consumers of food products and to the Congress of the United States."

16. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products and to the Congress of the United States."

17. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

18. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

19. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

20. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

21. The learned court below erred in refusing to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

22. The learned court below erred in refusing to affirm the plaintiff's second request for conclusion of law:

"2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

23. The learned court below erred in refusing to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1916 and 1921."

24. The learned court below erred in refusing to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

25. The learned court below erred in refusing to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest."

26. The learned court below erred in its conclusion of law as follows:

"1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word 'candy' in the revenue acts of 1918 and 1921."

27. The learned court below erred in its conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

131 28. The learned court below erred in its conclusion of law, as follows:

"3. The defendant is entitled to judgment."

29. The learned court below erred in entering judgment against the plaintiff and in favor of the defendant.

Wherefore appellant prays that the judgment entered in said cause in the said District Court for the Eastern District of Pennsylvania may be reversed and the said cause remanded.

A. ALLEN WOODRUFF,
WM. CLARKE MASON,
Attorneys for Plaintiff.

132 In United States District Court

[Title omitted.]

Petition for appeal

Filed May 17, 1929

TO THE HONORABLE W. H. KIRKPATRICK, *District Judge:*

The above-named plaintiff, Wilbur-Suchard Chocolate Company, Inc., feeling aggrieved by the judgment rendered and entered in the above-entitled cause on the 22nd day of April, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignments of error filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings, and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it to perfect its appeal be made.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

WILBUR-SUCHARD CHOCOLATE COMPANY, INC.,
By A. ALLEN WOODRUFF,
WM. CLARKE MASON,
Attorneys for Plaintiff.

133 In United States District Court

WILBUR-SUCHARD CHOCOLATE COMPANY, INC., PLAINTIFF,
v.
BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE FOR THE First District of Pennsylvania, defendant

Order allowing appeal

Filed May 17, 1929

Before KIRKPATRICK, *J.*

Upon the petition of the plaintiff herein and plaintiff's assignments of error, it is hereby ordered that an appeal to the United States Circuit Court of Appeals for the Third Circuit from the judgment heretofore filed and entered in this cause on the 22nd day of April, 1929, be, and the same is hereby, allowed, and that a certified transcript of the record in accordance with the rules of practice of the courts of the United States be transferred to the said United States Circuit Court of Appeals for the Third Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250, the same to act as a bond for costs on appeal.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

By the court:
Attest:
GEORGE BRODBECK, *Clerk.*

134 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Filed May 17, 1929

To the Clerk of the said Court:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals for the Third Circuit pursuant to an appeal filed in the above-entitled case and to include in such transcript the following:

Docket entries;
Statement of claim;
Affidavit of defense;

Stipulation to try case before court without jury;
Opinion, Kirkpatrick, *J.*, filed November 22, 1928;
Findings of fact and conclusions of law;
Opinion, Kirkpatrick, *J.*, filed January 17, 1929;
Revised opinion, Kirkpatrick, *J.*, filed January 22, 1929;
Bill of exceptions;
Præcipe for judgment;
Judgment;
Petition for appeal and assignments of error;
Order allowing appeal;
Præcipe for transcript of record;
Physical exhibits;
Clerk's certificate.

A. ALLEN WOODRUFF,
WM. CLARKE MASON,
Attorneys for Plaintiff.

135 [Clerk's certificate to foregoing transcript omitted in printing.]

136 In United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4169

WILBUR-SUCHARD CHOCOLATE CO., APPELLANT

v.

BLAKELEY D. MCCAUGHN, COLLECTOR, APPELLEE

No. 4167

WILBUR-SUCHARD CHOCOLATE CO., APPELLANT

v.

EST. E. LEDERER, COLLECTOR, APPELLEE

No. 4168

WILBUR-SUCHARD CHOCOLATE CO., APPELLANT

v.

EST. E. LEDERER, COLLECTOR, APPELLEE

Order assigning judge

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to wit, this 15th day of November, A. D. 1929, it is ordered that Hon. John Boyd Avis, district judge for the district

of New Jersey, be, and he is hereby, assigned to sit in above case in order to make a full court.

(Sgd.) JOSEPH BUFFINGTON,
Circuit Judge.

137 [Minute entry of argument and submission Nov. 15, 1929, omitted in printing.]

138 IN

United States Circuit Court of Appeals

For the Third Circuit

HERSHEY CHOCOLATE CO., APPELLANT v. B. D. McCAUGHN, COLLECTOR, APPELLEE	No. 4157, October Term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4158, October Term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4159, October Term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4160 October Term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. B. D. McCAUGHN, COLLECTOR, APPELLEE	No. 4161, October Term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4162, October Term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4163, October Term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4164, October Term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4165, October Term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. B. D. McCAUGHN, COLLECTOR, APPELLEE	No. 4166, October Term, 1929

WILBUR-SUCHARD CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4167, October term, 1929
WILBUR-SUCHARD CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4168, October term, 1929
WILBUR-SUCHARD CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4169, October term, 1929
YORK CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4170, October term, 1929
YORK CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4171, October term, 1929
YORK CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4172, October term, 1929

Appeals from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

Filed June 6, 1930

Before WOOLLEY and DAVIS, *Circuit Judges*, and AVIS, *District Judge*

AVIS, *District Judge:*

These cases were all tried in the District Court at one time; one opinion was rendered in all of the cases, and although brought into this court by separate appeals, were heard in one argument.

Appellants are all manufacturers of sweet chocolate and sweet milk chocolate, the product of the cacao bean, and made certain payments of amounts alleged to be due the Government as taxes, under the revenue acts of 1918 and 1921 and the regulations of the Internal Revenue Commissioner. All of said payments were made "under protest," and later, at different and sundry times, appellants filed claims for refund with the Collectors of Internal Revenue, in the various districts in which payments had been made, for transmission to the Commissioner of Internal Revenue. All of said claims for refund were rejected by the commissioner, and the suits followed.

The district court, sitting without a jury, heard the testimony, held that the tax was lawfully imposed, and caused judgment to be

entered in favor of the defendants, and from these judgments all of the cases are brought by appeal to this court.

Twenty-nine assignments of error were filed and relied upon by the appellants, but as a matter of fact they are all merged in one question to be decided; i. e., Does the word "candy" in the revenue act of 1918 (Title IX, sec. 900 (9)) and the revenue act of 1921 (Title IX, sec. 900 (6)) include sweet chocolate and/or sweet milk chocolate?

The portion of the act of 1918 under which the tax was assessed and paid reads as follows:

"That there shall be levied, assessed, collected, and paid upon the following article sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased——

* * * * * * * * *

"(9) Candy, 5 per centum; . . ." (40 Stat., c. 18, pp. 1057, 1122).

The act of 1921 reads exactly the same, with the exception that the percentage of tax is placed at 3 per cent instead of 5.

The decision of this question rests upon—

(1) The definition of the word "candy."

(2) Whether or not sweet chocolate and sweet milk chocolate is candy in accordance with its commonly accepted use?

(3) Did Congress intend to include sweet chocolate and sweet milk chocolate under the term "candy" in the revenue acts?

(4) Was the regulation of the Commissioner of Internal Revenue conclusive, and did he have authority, under the acts, to include sweet chocolate and sweet milk chocolate under the term "candy"?

(5) Do the classifications promulgated by the Secretary of Agriculture, under the pure food laws, in any way affect the question of the legality of the tax imposed?

Under the evidence in this case, it is rather difficult to define the word "candy." There is nothing in the testimony, outside of the technical definitions, and possibly the classifications promulgated by the Secretary of Agriculture, to assist the court in arriving at a conclusion as to the inclusiveness of the word. Webster defines candy as follows:

"A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruit, nuts, etc. Also, any sweetmeat made of, or coated with, a preparation of sugar or molasses; a piece of confectionery."

The evolution of the use of sweetmeats in modern times may have, and probably has, extended the meaning of the word to other articles than those strictly included in the definition given by Webster.

Counsel for appellants argue that the classification by the Secretary of Agriculture, under the pure food laws and under authority

given by Congress, indicates that sweet chocolate and sweet milk chocolate are not included within the designation of "candy."

It is true that in this classification candy and chocolate, both "sweet" and "sweet milk," are under separate heads, and it is apparent that for purposes of the statute under which this classification was made, it was undoubtedly treated under separate headings, but this may not be conclusive in construing the revenue acts under which this suit was brought. Whether or not "candy" in its technical, sense, includes sweet chocolate and/or sweet milk chocolate, we do not deem it necessary to decide, in view of our conclusions hereinafter set forth, with relation to the intention of Congress when the revenue acts of 1918 and 1921 were enacted.

The court below said, with relation to the word "candy" as it applies to sweet chocolate and sweet milk chocolate:

"It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact. It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion. While some people might look upon it as candy, we feel that many would call it a food, and in the absence of anything in the record tending to show that this is the popular opinion, we cannot sustain the judgment of the court on this theory.

We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.

In all of the tariff and internal revenue acts of Congress from 1792 to 1913, candy generally called "sugar candy," and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate, and, when it was asserted that chocolate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the members of Congress.

The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in congressional enactments or by executive regulation, included in the term "candy," is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate eo nomine, notwithstanding the fact that the regulations of the Commissioner, classifying both as "candy" under the 1918 act, and that the District Court decision in Massachusetts holding they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of De Forest, et al., v. Lawrence, 54 U. S. 273, 281, said:

"And, although it has been invoiced, and is known in trade and commerce, by the designation of skeepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the customhouse.

"It is but fair to presume, after having been treated by the lawmakers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically or by enumeration, the designation by which it was known to them would have been used instead of the one known to trade and commerce, if that should be different."

In Reiche v. Smythe, 80 U. S. 162, 165, it was held:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in pari materia, and it will be presumed that if the

same word be used in both and a special meaning were given it in the first act that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."

The effect of the distinction recognized by Congress is very aptly referred to in the case of Arthur v. Stephani, 96 U. S. 125, 127, 128, wherein the court, among other things, said:

"Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name.

* * * * * * *

"Contemporaneously and side by side all the way down the statutes provide for different rates of duty on the varieties of sugar and on confectionery as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties.

* * * * * * *

"It is quite evident that Congress has at all times intended to preserve the distinction between these articles and that the circuit judge decided correctly when he held that chocolate, although in the form and of the character described, was not dutiable as 'confectionery' under the act of 1864."

This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case sub judice.

This is further demonstrated by an examination of the record of deliberations and discussions in the committees and also upon the floor of the Senate when the 1921 act was under consideration, which are corroborative of the facts upon which our conclusions are based.

An examination of the evidence offered in this regard discloses that a Mr. Fuller, apparently a candy manufacturer, called the attention of the Senate committee to a decision in the United States court, district of Massachusetts, holding that chocolate was not candy, and not taxable under the 1918 act; and that some provision should be made in the 1921 act to put chocolate upon the same basis as candy, either by removing the tax from candy or, inferentially, to impose a similar tax on chocolate. Similar representations were made to the House Ways and Means Committee, and the question was discussed quite fully on the floor of the Senate, the understanding, apparently at that time, being that the word "candy" in the revenue act of 1918 did not include sweet chocolate or sweet milk chocolate.

In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the committee a definition of the word "candy," which included sweet chocolate and sweet

milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases.

The deliberations of the committees and the facts produced before them when considering the bill appear to be legal evidence and should be given its due weight. Holy Trinity Church v. United States, 143 U. S. 457, 464; Binns v. United States, 194 U. S. 486, 495.

In spite of the knowledge of the Representatives and Senators in Congress no definite tax was levied on sweet chocolate or sweet milk chocolate; and from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the revenue acts of 1918 or 1921.

In both the revenue acts of 1918 and 1921 the authority of the commissioner to make needful rules and regulations with the approval of the Secretary, is in the following language:

"That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

It will be noted in this statute that it provides for "rules and regulations" which shall be "for the enforcement of the provisions of this act."

The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly the commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

In the case of Morrill v. Jones, 106 U. S. 466, 467, Chief Justice Waite said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

See also United States v. United Verde Copper Co., 196 U. S. 207.

A regulation of an executive department construing a statute is given great weight, and is strongly persuasive, and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. See Burk-Waggoner Oil Assn. v. Hopkins (N. D. Tex.), 296 F. 492, and cases cited.

Taking into consideration, the reading of the statute; the prior attitude of Congress with relation to imposition of taxes on chocolate; and the fact that the matter was considered and discussed in

committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulations defining "candy," afterward promulgated by the commissioner and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant-appellee.

We therefore hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the commissioner approved by the Secretary.

It is contended by the appellants that the classifications of the Secretary of Agriculture, promulgated under the pure food laws, conclusively define chocolate as a product which could not be included under the term "candy," which is also classified in these regulations. These classifications were made under laws relating to pure foods; and while they might have some effect upon the establishment of the general definition of the respective products, we can not see that they are in any way controlling on the main questions at issue in these cases.

The case of Malley v. Walter Baker & Co. (C. C. A. 1), 281 F. 41, is strongly relied upon by the appellee, it being the contention that this case is controlling as establishing a precedent which in effect should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley case there was no decision upon the question of what Congress intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress or the proceedings of the committees of Congress in consideration of the bills was submitted to the court considering that case. We are not able to follow that court in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word "candy," or in its conclusion that the commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress.

The judgments of the District Court are reversed and the cases remanded for new trials or other lawful proceedings in conformity with this opinion.

A true copy:

Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

139 In United States Circuit Court of Appeals for the Third Circuit

No. 4169. October term, 1929

WILBUR-SUCHARD CHOCOLATE CO., APPELLANT

v.

BLAKELY D. MCCAUGHN, COLLECTOR, APPELLEE

In Error to the District Court of the United States for the Eastern District of Pennsylvania

Judgment

June 6, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of said District Court in this cause be, and the same is hereby, reversed and the case remanded to the said District Court for further proceedings in conformity with the opinion of this court.

Philadelphia, June 6, 1930.

/sgd/ VICTOR B. WOOLLEY,
Circuit Judge.

Similar orders entered June 6, 1930, in the following cases:

Wilbur-Suchard Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee, No. 4167.

Wilbur-Suchard Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee, No. 4168.

140 [Clerk's certificate to foregoing transcript omitted in printing.]

United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4167

WILBUR-SUCHARD CHOCOLATE COMPANY, INC., APPELLANT

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY Internal Revenue Collector, deceased, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of

this case shall be controlled by and conform to the ultimate decision in the case of Wilbur-Suchard Chocolate Company, Inc., Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for the First District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4169, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Wilbur-Suchard Chocolate Company, Inc., Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for the First District of Pennsylvania, Appellee, U. S. C. C. A., Third Circuit, October term, 1929, No. 4169.

Dated June 17, 1929.

A. ALLEN WOODRUFF,
WM. CLARKE MASON,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved: June 20, 1929.
Buffington,
C. J. Per curiam.

Endorsements: No. 4167. Stipulation of counsel received & filed Jul. 5, 1929. William P. Rowland, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, Set.

I, William P. Rowland, clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Wilbur-Suchard Chocolate Company, Inc., Appellant, v. Grace N. Lederer, Executrix of Ephraim Lederer, formerly Internal Revenue Collector, deceased, Appellee No. 4167, October term, 1929, on file and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 5th day of September, in the year of our Lord one thousand nine hundred and thirty and of the Independence of the United States the one hundred and fifty-fifth.

[SEAL.] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4168

WILBUR-SUCHARD CHOCOLATE COMPANY, INC., APPELLANT

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY Internal Revenue Collector, deceased, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of Wilbur-Suchard Chocolate Company, Inc., Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for the First District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4169, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of Wilbur-Suchard Chocolate Company, Inc., Appellant, vs. Blakely D. McCaughn, Collector of Internal Revenue for the First District of Pennsylvania, Appellee, U. S. C. C. A., Third Circuit, October term, 1929, No. 4169.

Dated June 17, 1929.

A. ALLEN WOODRUFF,
A. ALLEN WOODRUFF,
WM. CLARKE MASON,
WM. CLARKE MASON,
Attorneys for Appellant.
GEORGE W. COLES,
GEORGE W. COLES,
Attorney for Appellee.

Approved: June 20, 1929.
Buffington,
C. J. Per curiam.

Endorsement: 4168 stipulation of counsel. Received & filed Jul. 5, 1929. William P. Rowland, clerk.

UNITED STATES OF AMERICA,

Eastern District of Pennsylvania, Third Judicial Circuit, Sct.

I, William P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of Wilbur-Suchard Chocolate Company, Inc., Appellant, vs. Grace N. Lederer, Executrix of Ephraim Lederer, formerly Internal Revenue Collector, deceased, Appellee, No. 4168, October term, 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 5th day of September, in the year of our Lord one thousand nine hundred and thirty and of the Independence of the United States the one hundred and fifty-fifth.

[SEAL.] WM. P. ROWLAND,

Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1930

1 Supreme Court of the United States

October term, 1930

No. 438

B. D. McCaughn, Collector, petitioner

vs.

Wilbur-Suchard Chocolate Co.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

2 Supreme Court of the United States

October term, 1930

No. 436

[illegible]st. E. Lederer, Collector, petitioner

vs.

Wilbur-Suchard Chocolate Co.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

3

Supreme Court of the United States

October term, 1930

No. 437

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

WILBUR-SUCHARD CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

CLERK'S COP

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 441

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

No. 439

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

No. 440

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 8, 1930
CERTIORARI GRANTED OCTOBER 20, 1930

(35363, 35361, 35362)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. —

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

No. —

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

No. —

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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September term, 1924. No. 10936

YORK CHOCOLATE COMPANY

v.

BLAKELY D. McCAUGHN, COLLECTOR OF INTERNAL REVENUE

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George W. Coles.
Sept. 29, 1924. Præcipe to issue summons filed.
Sept. 29, 1924. Summons exit—returnable first Monday in October, 1924.
Oct. 10, 1924. Appearance of George W. Coles, Esq., for defendant filed.
Oct. 25, 1924. Summons returned on October 4 served and filed.
Aug. 31, 1925. Statement of claim filed.
Jan. 18, 1927. Affidavit of defense filed.
Sept. 8, 1927. Præcipe to place case on trial list filed.
Feby. 24, 1928. Stipulation of counsel waiving jury trial filed.
Mar. 20, 1928. Præcipe to place case on argument list filed.
May 21, 1928. Trial before court without a jury.
May 22, 1928. Trial resumed—witnesses sworn.
June 7, 1928. Plaintiffs request for findings of fact and conclusions of law filed.

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1 In United States District Court, Eastern District of Pennsylvania.

September term, 1924. No. 10936

YORK CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE

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May 21, 1928. Trial before court without a jury.
May 22, 1928. Trial resumed—witnesses sworn.
June 7, 1928. Plaintiffs request for findings of fact and conclusions of law filed.
June 7, 1928. Argued sur P. & P.
June 13, 1928. Testimony filed.
Nov. 22, 1928. Findings of fact and conclusions of law filed.
2 Nov. 22, 1928. Opinion of the court filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926, No. 12360).
Nov. 22, 1928. On motion of counsel for plaintiff, reargument ordered for December 4, 1928.
Dec. 4, 1928. Reargument sur findings of fact.
January 17, 1929. Opinion sur re-argument filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926, No. 12360).
January 22, 1929. Opinion filed November 22, 1928, withdrawn and revised opinion filed (see opinion in Hershey Chocolate Company v. Blakely D. McCaughn, June term, 1926, No. 12360).
Jan. 26, 1929. Plaintiff's exceptions filed.
Jan 26, 1929. Plaintiff's bill of exceptions and order of court sealing same filed.
Apr. 22, 1929. Præcipe to enter judgment filed.
Apr. 22, 1929. Judgment in favor of defendant filed.

May 17, 1929. Assignments of error filed.
May 17, 1929. Petition for appeal filed.
May 17, 1929. Order of court granting appeal filed.
May 17, 1929. Præcipe for transcript of record sur appeal filed.
June 10, 1929. Bond sur appeal and order of court approving same filed.
June 10, 1929. Citation allowed and issued.
June 10, 1929. Copy of notice of appeal filed.
June 11, 1929. Citation returned "Service accepted" and filed.

3 In United States District Court

[Titled omitted.]

Plaintiff's statement of claim

Filed August 31, 1925

York chocolate Company, the above-named plaintiff, complaining of the above-named defendant, brings this action against Blakely D. McCaughn, United States collector of internal revenue for the First District of Pennsylvania, the defendant above named, upon a cause of action whereof the following is a statement:

1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at York, in the county of York, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the First District of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of one hundred and six thousand eight hundred and twenty-five dollars ($106,825.00), and during the period from January 1, 1922, to June 30, 1924, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk choco-
4 late in various forms and sizes, having a total selling price of one hundred and ninety-eight thousand and forty-nine dollars ($198,049.00).

4. The collector of internal revenue the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9) did, for the periods aforesaid, assess excise taxes against the plaintiff aggregating eleven thousand two hundred and eighty-two and 72/100 dollars ($11,282.72).

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, a tax of eleven thousand two hundred and eighty-two dollars and seventy-two cents ($11,282.72), being five per centum (5%) of the amount of said sales of one hundred and six thousand eight hundred and twenty-five dollars ($106,825.00) and three per centum (3%) of amount of said sales of one hundred ninety-eight thousand forty-nine dollars ($198,049) payments being made as follows:

Date of payment	Amount paid	Date of payment	Amount paid
July 30, 1921	$289.08	March 30, 1923	$194.39
August 30, 1921	174.03	April 28, 1923	177.51
September 29, 1921	407.86	May 29, 1923	104.50
October 31, 1921	1,264.25	June 29, 1923	100.61
November 30, 1921	1,602.44	July 30, 1923	68.84
December 29, 1921	1,227.84	August 30, 1923	38.94
January 31, 1922	375.74	September 28, 1923	48.77
February 27, 1922	448.09	October 26, 1923	105.00
March 30, 1922	250.09	November 21, 1923	315.01
April 28, 1922	165.73	December 17, 1923	143.68
May 29, 1922	182.90	January 19, 1924	84.40
June 29, 1922	143.94	February 19, 1924	64.52
July 29, 1922	209.70	March 20, 1924	46.87
August 30, 1922	227.08	April 24, 1924	94.60
September 29, 1922	279.13	May 19, 1924	52.77
October 30, 1922	554.97	June 19, 1924	42.24
November 29, 1922	558.80	July 22, 1924	45.74
December 29, 1922	598.63		
January 30, 1923	247.07		11,282.72
February 27, 1923	$359.91		

6. The revenue act of 1918 aforesaid did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate nor upon "tea, coffee, and cacao product."

7. The sweet chocolate and sweet milk chocolate manufactured and sold by plaintiff, as hereinbefore stated, upon the sales of which plaintiff paid a tax to defendant involuntarily and under protest, as hereinabove stated, are the product of cacao (cocoa) beans which are the seeds of the cacao tree, roasted, broken and freed from husks, shells and germs without the removal of other constituents.

8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists, and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice.

The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

9. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture superseding its earlier circulars Nos. 10, 13, 17 and 19, on the same subject to the same effect and contains the following:

6 (Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products"

"C. Cacao Products"

(1) Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

(2) Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

(3) Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coating, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

(4) Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

(5) Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

(6) Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

(7) Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

(8) Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

(9) Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

(10) Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat-free residue of chocolate.

(11) Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product.

10. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugar and Related Substances," under which classification is included "candy" and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "c. 'Candy'," which is therein defined as "a product made from a saccharine substance or substances."

11. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America, and the only legal standards of purity, classification, and definitions of food products for the United States of America are the definitions and standards fixed by the Secretary of Agriculture by virtue of the power vested in him heretofore referred to.

12. The tax paid by plaintiff to defendant as aforesaid, was collected by defendant wrongfully, illegally, and without warrant in law, and to the damage of plaintiff.

13. The plaintiff, in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for repayment to it of the amounts of the said taxes erroneously and illegally collected. On or about August 28, 1923, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the claims for refund of amounts aggregating $10,117.40, were rejected. A copy of the said notice of rejection is attached hereto as Exhibit B. On or about January 20, 1925, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue that the claims as tabulated on Exhibit A hereto attached, were rejected. A copy of said notice of rejection is attached hereto as Exhibit A.

14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

15. Wherefore the plaintiff says that the defendant is indebted to it upon an oral contract, to wit, a contract implied in law, in the sum of eleven thousand two hundred and eighty-two dollars and seventy-two cents ($11,282.72), with interest thereon from the aforesaid several dates of payment under protest, and demands judgment against the defendant for that amount with costs.

D. F. Magee,
Attorney for Plaintiff.

Office and Post Office Address, Lancaster, Pennsylvania.

9 [*Duly sworn to by D. Frank Magee. Jurat omitted in printing.*]

Exhibit A to statement of claim.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, January 20, '25.

Address reply to Commissioner of Internal Revenue and refer to Mt-ST-WEM, Cl. 335997, et al.

YORK CHOCOLATE Co.,
Duke & Hay Streets, York, Pa.
(Attention: D. Frank Magee.)

GENTLEMEN: Reference is made to the following claims filed by you for the refund of manufacturer's excise tax alleged to have been erroneously paid on the sale of sweet chocolate.

10 Claim	Amount	Paid for (months)	Claim	Amount	Paid for (months)
335997	$66.84	June, 1923.	336004	$46.87	February, 1924.
335998	120.61	May, 1923.	336005	64.53	January, 1924.
335999	177.51	March, 1923.	336006	24.40	December, 1923.
336000	45.74	June, 1924.	336007	143.68	November, 1923.
336001	42.24	May, 1924.	336008	315.01	October, 1923.
336002	52.77	April, 1924.	336009	195.00	September, 1923.
336003	94.69	March, 1924.	336010	42.77	August, 1923.
336003-A	194.10	April, 1923.	336011	35.94	July, 1923.

You are advised this office holds that the sweet chocolate, such as York stars, thrift bars, York blossoms, etc., upon which the tax involved was paid was properly subject to the tax on candy imposed by section 900 of the revenue act of 1921.

Your claims are accordingly rejected.

Respectfully,

NW. D. H. BLAIR, *Commissioner.*

Exhibit B to statement of claim.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
Washington, Aug. 28, 1923.

Address reply to Commissioner of Internal Revenue and refer to ST-LON Cls-301041 to 301059, 301660, 61, 301683 & 85

YORK CHOCOLATE COMPANY, INC.,
Duke & Hay Sts., York, Pa.

GENTLEMEN: Reference is made to your claims filed for refund of amounts aggregating $10,117.40, representing manufac-
11 turer's excise taxes alleged to have been erroneously paid on the sale of sweet chocolate.

The claims are based upon the contention that this tax was paid upon the sale of sweet chocolate as candy. It is further stated that since the sweet chocolate in question is not candy, the amount paid was illegally collected.

In this connection you are advised that this office holds the sweet chocolate manufactured by you to be candy and to be properly subject to tax imposed by section 900 of the revenue acts of 1918 and 1921. Since the tax has been properly paid, the claims are rejected in full.

Respectfully,

EMT D. H. BLAIR, *Commissioner.*

12 In United States District Court

[Title omitted.]

Affidavit of defense

Filed January 18, 1927

STATE OF PENNSYLVANIA,
County of York, ss:

Blakely D. McCaughn, being duly sworn according to law, deposes and says that he is the defendant named in the above-entitled case, and that he has a full, just, true, and legal defense to the whole of the plaintiff's claim, of the character and nature as follows, to wit:

1. He admits the allegations of the first paragraph of plaintiff's statement of claim.

2. He admits the allegations of the second paragraph of plaintiff's statement of claim.

3. He has no information as to the allegations contained in the third paragraph of the plaintiff's statement of claim, nor has he any means of ascertaining whether the facts as therein stated are true or not, and he therefore calls for strict proof thereof.

4. He admits the allegations of the fourth paragraph in so far as they refer to an assessment of excise tax against the plaintiff under and by virtue of the revenue act of 1918, Title IX, section 900 (subdivision 9), but avers that the aggregate amount paid by the plaintiff under such assessment was $11,282.61 instead of the amount of $11,282.72, as alleged by the plaintiff.

5. He admits the allegations of the fifth paragraph in so far
13 as they refer to a return by the plaintiff of the amount of said sales of sweet chocolate and sweet milk chocolate, and that such return was made under protest, and further admits that all payments were made by the plaintiff under protest;

The defendant further admits the allegations made by the plaintiff in respect to all payments itemized in this paragraph, with the

exception of the payment made November 30, 1921, the plaintiff alleging such payment to be $1,602.44; the defendant avers that such payment was not $1,602.44, but was in fact $1,602.33; defendant further avers that said aggregate amount paid by the said plaintiff was not $11,282.72 as contained in plaintiff's allegations in this paragraph, but was in fact $11,282.61.

6. He denies that the revenue act of 1918, aforesaid, did not impose any tax upon sales of either sweet chocolate or sweet milk chocolate.

7. He denies the allegation contained in the seventh paragraph of plaintiff's statement of claim and avers that the sweet chocolate and the sweet milk chocolate manufactured and sold by the plaintiff is the result of mixing the product of cacao (cocoa) beans, after being properly treated with sugar and other ingredients.

8. He admits the allegations of the eighth paragraph in so far as they refer to the authority in the Secretary of Agriculture "to establish standards for food products"; but avers that they are matters wholly immaterial to the issues in this case.

9. He admits the allegations of the ninth paragraph but avers that they are wholly irrelevant and immaterial to the issues in this case.

10. He admits the allegations of paragraph ten, but avers that they are wholly irrelevant and immaterial to the issues in this case.

11. He admits the allegations in the eleventh paragraph
14 in so far as they refer to any authority vested in the Secretary of the Treasury to establish definitions, standards of purity, classification and definitions of food products for the United States of America; he denies that power was vested in the Secretary of Agriculture to establish legal standards of purity, classification, and definitions of food products for the United States of America which would have any control over the Secretary of the Treasury or this honorable court in classifying the sweet chocolate and sweet milk chocolate, upon which taxes were assessed and collected in this case; and he avers that all of the allegations contained in paragraph eleven are wholly irrelevant and immaterial to the issues in this case.

12. He denies that the tax collected, as aforesaid, was wrongfully and illegally collected, but avers that there was warrant in law for the tax collected from the plaintiff and that such tax was sustained by the Circuit Court of Appeals for the First Circuit in the case of Malley, Collector, vs. Walter Baker & Company, Ltd., reported in 281 Fed. Rep. at page 41.

13. He admits the allegations of the thirteenth paragraph.

14. He admits the allegations of paragraph fourteen.

15. He denies that the defendant is indebted to the plaintiff in any amount or that the plaintiff is entitled to recover under implied contract, or otherwise, from the defendant in any amount.

All the facts herein stated of the defendant's own knowledge are true; the facts stated upon information from others he believes to be

true; and all of them he expects to be able to prove upon the trial of the cause.

B. D. McCaughn.

Subscribed and sworn to before me this 18th day of January, 1927.

[SEAL.] Anthony T. Mita, *Notary Public.*

My commission expires March 2, 1929.

15 In United States District Court

[Title omitted.]

Stipulation Waiving Jury

Filed February 24, 1928

It is stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes.

George W. Coles,
United States Attorney.

D. F. Magee,
Attorney for York Chocolate Co.

Philadelphia, Pa.

16 In United States District Court

Hershey Chocolate Company

v.

Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania.

*Opinion of the Court**

Kirkpatrick, *J.*

Filed November 22, 1928

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were

*Note.—This opinion (filed November 22, 1928), for which the revised opinion of January 22, 1929, was substituted, was changed by the latter in the following particulars only:

(a) The sentence, "This decision had been appealed from and the case was pending in the Circuit Court of Appeals," appearing in the 11th and 12th lines of page 19 was omitted from the revised opinion.

(b) The words, "the pending," appearing in the 2nd and 3rd lines from the bottom of page 19 were omitted from the revised opinion.

(c) The words "concededly not an ex nomine description" appearing in the 17th and 18th lines of page 24 were omitted from the revised opinion.

See pages 31 to 40, both inclusive, for revised opinion.

instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

17 The relevant provision of the revenue Act of 1918 is as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy
18 departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: Solid chocolate bon bons, "chocolate kisses," "chocolate de-

lights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as "a confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word "candy" to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history ap-
19 plies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word "candy," the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when sold for others. The United States District Court for the District of Massachusetts had construed the word "candy" in that act as not including sweet chocolate in any form. This decision had been appealed from and the case was pending in the Circuit Court of Appeals. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the Legislature has adopted that construction, but a decision of a District Court with an appeal

therefrom pending and undisposed of cannot be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the Members of Congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on the pending appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as
20 corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word "candy" from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes (mostly tariff acts but including several revenue acts) enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section" and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff acts of March 3, 1883, the classifications are "sugar candy," "all other confectionery," and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery
21 not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. * * *." To the same effect is Reiche v. Smythe, 13 Wallace 163, and other cases.

These decisions announce a well established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding, therefore, that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave if for the moment. The principle involved cannot be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485. A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's interpretation of Statutes, Sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows,

has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various
23 acts of Congress, and of the word "confectionery," which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore, not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the Legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the first Circuit in Malley v. Walter Baker Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor

does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit, was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term concededly not an eo nomine description, and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The Court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term "candy" which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less

artificial nature. As between these considerations, if they lead in opposite directions, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word "candy" of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court.

W. H. KIRKPATRICK, *J.*

26 In United States District Court

[Title omitted.]

Findings of fact.

Filed Nov. 22, 1928

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

Conclusions of law.

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

8. The defendant is entitled to judgment.
The plaintiff's requests for conclusions of law are all denied.
By the court.

W. H. KIRKPATRICK, *J.*

In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Opinion sur reargument

KIRKPATRICK, *J.*

Filed January 17, 1929

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company stated that, at the time the act of 1921 was passed, this decision had been appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases.

"In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are: First, that the above manner of finding facts is not proper practice, and second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice, which exists in the Pennsylvania courts both in equity and in trial at law without a jury, would be an added and heavy burden upon the trial judge and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of proper practice in stating the fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an anxiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went

as to say: "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect of the opinion in that case to abrogate the well established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all. The act there under consideration was a special act allowing a suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy," however, we have just the opposite situation. Here the most important consideration is the popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can Co. #94, October term, 1928), the general rule referred to is reaffirmed. The court said "Decisions of this court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity (United States v. Goldenberg, 168 U. S. 95, 103), or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this Court in the cases now before it did not refuse to consider the apparently limited uses of the word in other acts of Congress. That matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the later considerations were the more important and controlling ones.

The conclusions reached in the opinion filed will not be changed.

By the court,

W. H. KIRKPATRICK, J.

31 In United States District Court

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

Revised opinion of the court

KIRKPATRICK, *J.*

Filed January 22, 1929

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected and paid upon the following articles sold or leased by the manufacturer, producer or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * *

"(9) Candy, 5 per centum."

32 The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with

the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "Solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the products in
33 question are usually consumed in the same manner as candy; that is, eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word "candy" to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under that act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word, "candy," the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it when

sold for others. The United States District Court for the District of Massachusetts had construed the word "candy" in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had
34 protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the Legislature has adopted that construction, but a decision of a District Court with an appeal therefrom pending and undisposed of cannot be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the members of congress in voting for the act of 1921 regarded the decision of the District Court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word "candy" from its prior acts of Congress is a strong one, coming very close to being compelling, and the plaintiff is entitled to have it fully considered here. There have been called to the attention of the court thirty-two statutes, mostly tariff acts but including several revenue acts, enacted over a period of one hundred and thirty-eight years, all of which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and
35 candy on the other. In these statutes Congress has specifically provided for chocolate, eo nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate eo nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section" and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar,"

and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reich v. Smythe, 13 Wallace 162, and other cases.

36 These decisions announce a well established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Trent, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 182 U. S. 655.

Concluding, therefore, that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave it for the moment. The principle involved can not be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms."

Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. U. S., 242 U. S. 470, 485.

A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. The first and most elementary rule of construction is, that it is to be assumed
37 that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlish's interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word "candy" has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of Congress, and of the word "confectionery," which is of broader meaning, has been involved in many cases before the Federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

Curiously enough both parties insist that the meaning of the term is clear and unambiguous (and, therefore, not open to construction), and yet both have advanced a number of arguments
38 based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the Legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the revenue acts of 1918 and 1921, it becomes perfectly

obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the First Circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate which was the subject of the suit was such as is ordinarily sold by confectioners as confectionery. It was conceded that the word "chocolate" used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regula-

tions do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term "candy" which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word "candy" of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made, based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court.

W. H. KIRKPATRICK, *J.*

In United States District Court

YORK CHOCOLATE COMPANY, PLAINTIFF

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania, defendant

Plaintiff's bill of exceptions

CAPTION

Be it remembered, That in the said term of September, 1924, came the said plaintiff into the said court, and impleaded the said defendant in a certain plea of assumpsit, etc., in which the said

plaintiff declared (prout statement) and the said defendant pleaded (prout plea). And thereupon issue was joined between them.

And thereafter by stipulation filed of record on the 24th day of February, 1928, it was "stipulated and agreed between the attorneys of record herein that, a jury trial being waived, the issues of fact in this case may be tried and determined by the court without the intervention of a jury, in accordance with sections 649 and 700 of the United States Revised Statutes."

And afterwards, to wit, at a session of the said court, held in the district aforesaid before the Honorable W. H. Kirkpatrick, judge of the said court, on the 21st day of May, 1928, the said issue between the said parties came to be tried by the court without a jury; at which day came as well the said plaintiff as the said defendant by their respective attorneys; and upon the trial, the witnesses being duly sworn or affirmed the following testimony was produced:

42 Transcript of Testimony and Rulings

[Title omitted.]

Before KIRKPATRICK, *J.*

Philadelphia, Pa., Monday, May 21, 1928, at 10.00 o'clock a. m., eastern daylight saving time.

Present: William Clarke Mason, Esq., and D. F. Magee, Esq., for plaintiff;

R. W. Wilson, Esq., and Mark Thatcher, Esq., for defendant.

Plaintiff's evidence and stipulated facts

Mr. MASON. If your honor please, in cases brought by the Hershey Chocolate Company against B. F. Davis, formerly collector, Nos. 10726 and 10824, and in cases brought by the Hershey Chocolate Company against Ephraim Lederer, formerly collector, Nos. 10822 and 10826, we ask leave to file stipulations amending the name of the defendant by substituting "executrix" in each case, both of those defendants having died and executrixes having been appointed. In the case of B. F. Davis, we substitute "M. Louisa Davis" as the executrix of the estate of the said B. F. Davis, deceased, and in the case of Ephraim Lederer, we substitute "Grace N. Lederer" as the executrix of the estate of Ephraim Lederer, deceased.

If your honor please, if I may, before starting the proof, I will outline to you, in a very brief way, just what the problem of procedure is that we have here, and ascertain whether it meets with your honor's approval.

43 There are sixteen cases all told, three of them in which the Wilbur-Suchard Chocolate Company is plaintiff, four in which the Klein Chocolate Company is plaintiff, three in which the York Chocolate Company is plaintiff, and six in which the Hershey Chocolate Company is plaintiff, all of them against the collector of internal

revenue in office at the time the taxes were paid, and all of them for the payment to the plaintiffs of moneys paid by the manufacturers for excise taxes upon candies under the act of 1918 and 1921.

Counsel for the Government and counsel for the plaintiffs have found in these cases that, so far as we can see in advance of the proof, substantially all of them involve the same questions. There may be some variations, however, in the proofs in relation to the products of one manufacturer that will not be the same as the proofs in relation to the products of other manufacturers, and on the assumption that that difference may arise, and to protect the record, which is being made in so many cases, tried together, the plan which we propose is this, sir: That the admitted facts in the record of pleadings be put upon the record in each one of the sixteen cases, that the documentary proof, in so far as it is general—and I think it will be general as to all of them—be offered as to all of the cases, that means as to each of them be offered at the one time, that when it comes to oral proof the witness, when called, shall be called as a witness in the case of one or the other plaintiffs, and that his testimony shall be taken as though given in each of the cases for that particular plaintiff, but as to the others until his testimony is concluded along the particular line in which the examination and cross examination is desired, that at the end of the examination of that particular witness, counsel will then indicate—presumably by agreement—whether, in addition to the testimony being taken for the cases of one of the four plaintiffs, it shall also be taken for the cases of the other three plaintiffs.

The COURT. At the conclusion?

44 Mr. MASON. At the conclusion of that testimony, and we will then indicate, for the record purposes, how far beyond the original call the testimony shall be extended, in order that not only the court and counsel may have an appreciation of the record facts for the several cases, and the limitation of them, but that the stenographer, in making the record for us, will be guided at that time in the reference to the extent to which that testimony is to be applied, and we expect, sir, that by so doing, we will not only be able to keep these cases and the record of them clearly in line, but that we will be able substantially to save the time of the court and expedite the trial.

The COURT. How many records are you going to make?

Mr. MASON. Our thought——

The COURT. That is surely a way to save time, but what are you going to do about the record?

Mr. MASON. Our thought, sir; We will make our records, and at the end of the hearings before your honor, if all of the testimony is general, we will ask that one record be made up for your honor's consideration and the consideration of counsel.

The COURT. If all the testimony——

Mr. MASON. If all of the testimony applies to all of the cases,

The COURT. For instance, if you call a witness in the three Wilbur cases, and all the testimony applies to all of them——

Mr. MASON. We will make up the one record.

The COURT. Suppose you call a witness in Wilbur, and Klein says that his testimony is applicable to him, and Hershey says no, then you will have to make a separate record?

Mr. MASON. Then, there will be separate records made, but when I speak of making up one record at the end of the testimony, I mean one record prelimarily. Of course, there will be eventually, in all probability, a complete transcript of all the cases. We will endeavor to so present it that you will not have in the preliminary stage of consideration of these cases more than the one record, except where certain testimony is applicable to certain cases only, and in that event, of course, a separate record will be made up for those cases.

Now, sir, pursuant to the agreement made with counsel for the Government and counsel for the plaintiffs, in the opening we desire to offer in evidence those facts set forth in the sixteen statements of claim, which have been admitted by the affidavit of defense or by consent of counsel.

The COURT. Have you copies of those statements?

Mr. MASON. I am going to give your honor a copy of each one, and to state to your honor that on the face of each statement of claim there is marked by lead pencil bracket, on the outside margin, the admitted facts. In several of the paragraphs there are internal brackets, which relate to words in those paragraphs to be excluded, and we shall ask that the stenographer note, for the purposes of the record, in each case those portions of the statement of claim which are indicated as I have stated, and include them as a part of the record of each case from the pleadings and admissions of counsel as facts admitted in these cases with the same force and effect as if they had been otherwise proved.

For the purpose of the record, may I say this: That in all of the statements of claim where reference is made in language similar to the language in the case of Wilbur-Suchard Company against Grace N. Lederer, No. 10774, to the standards for food products and the definitions of the same, set forth in that statement of claim in paragraphs 7, 8, and 9, the Government—while the pleadings admit the facts as stated in those paragraphs are true—desires to note an objection, and will press and argue the objection to your honor on the admissibility of these facts relating to those standards in these cases, and I call the attention of your honor, for record purposes, that that objection is to be noted wherever those paragraphs appear in the record of each of the cases.

The paragraphs referred to are as follows:

7. The act of Congress of June 3, 1902, and supplements, authorized the Secretary of Agriculture to establish standards of purity for food products and to classify the same. The standards

of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such statutory authority, are the official standards of such food products for the United States of America.

8. The standard of purity for food products established by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture and contain the following:

(Circular 136, page 18)

"E. Tea, Coffee, and Cacao Products"

"C. Cacao Products"

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocoate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials.

47 "6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

9. The standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the Class of "C. Sugars and Related Substances," under which classification is included "candy," and the said standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "candy."

In addition to the numbered paragraphs in each of the sixteen cases, to which reference is made for the admitted facts, I also offer in evidence the letters attached to the several statements of claim as exhibits in each of the cases to which the letters appear as exhibits, from the Department of Internal Revenue, in which there is set forth the fact that claims for refunds made have been rejected. Those letters are admitted to have been sent by the department and received by the plaintiff's and are part of the records of these cases.

So that your honor and all of us on this side of the bar will appreciate just what is involved by these admissions, I call your honor's attention to a typical case, and I am reading from Wilbur-Suchard, No. 10774. The first paragraph sets forth the identity of the plaintiff, and the second the identity of the defendant. The third sets forth the fact that during the period in question, the plaintiff sold to its customers sweet chocolate and sweet milk chocolate having a selling price of the amount therein set forth. Those sales will not be made evident by the details of the records. They have been examined and covered by counsel for both parties, and the facts are admitted.

The fourth paragraph sets forth the assessment of the excise tax under the revenue act of either 1918 or 1921.

The fifth sets forth the fact that, under protest, the returns were made and the tax paid.

The seventh, eighth, and ninth paragraphs are the paragraphs setting forth the fact that under the act of Congress of June 3, 1902, and supplements, the Secretary of Agriculture established standards of purity for food products, classified the same and defined those which are set forth in the classification.

The tenth——

The COURT. He says that he is authorized to establish standards and to classify, but where does he say he defines them?

Mr. MASON. We set forth the fact, sir, that the standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to statutory authority, are the official standards of such food products for the United States of America.

The COURT. Yes.

Mr. MASON. Then, in paragraph ten, the admitted fact is that there is no authority vested by act of Congress in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish standards of purity or classifications of food products for the United States of America.

The twelfth provides that we have complied with the required regulations and statutory proceedings to claim our refund, and that the refunds were denied, and that the refund of the tax, as made, has been refused.

Your honor, therefore, has before you the admitted facts in this case, with the Government's objections to the relevancy of the standards, and if Mr. Thatcher deems it well, we might dispose of that question now, so that we may have your honor's thought about it.

Mr. WILSON. If your honor please, it is admitted, as alleged in the various statements of claim of all these cases, that the Department of Agriculture has been given authority, under the act of Congress, to establish and maintain standards and classifications of food products. We have no quarrel with that proposition at all.

The Government contends that in the instant cases these allegations relating to the authority of the Secretary of Agriculture are immaterial and irrelevant, by virtue of the fact that, under the act of Congress of 1918 and also of 1921, the Commissioner of Internal Revenue was given express authority to promulgate such rules and regulations as would be reasonable, and would amount to a reasonable interpretation and application to all subjects taxed under the revenue acts. The Congress did not attempt, at the time of the passing of those acts, to add any interpretation of any words used.

In section 900, Subdivision IX, we find the single word "candy." Under that section 900, an excise tax, manufacturer's excise tax of 5 per cent, will be levied on candy, and pursuant to that section, the commissioner, by virtue of the authority vested in him by Congress, proceeded to define "candy" and to levy this tax of 5 per cent on products which come within that definition.

The COURT. What is it the Department of Agriculture defines?

Mr. WILSON. The plaintiffs in these cases having alleged in paragraphs 7, 8, and 9—they have dealt somewhat with the history of the congressional act, under and by virtue of which the Secretary of Agriculture has been given authority to establish standards of purity for food products and, as I say, we do not dispute that——

The COURT. Yes, sir; but what does it say? I have not read it. In what way does the Department of Agriculture define it?

Mr. WILSON. The Department of Agriculture has issued certain circulars, which are quoted verbatim in these statements of
50 claim, in paragraph 8, wherein it is alleged that the standard of purity for food products was in force May 14, 1919.

The COURT. They put sweet chocolate under the head of——

Mr. WILSON. By the Department of Agriculture sweet chocolate is considered under the head of subdivision "E. Tea, Coffee, and Cacao Products."

The COURT. Yes; all right. It does not happen to be under candy?

Mr. WILSON. No; in the Department of Agriculture it is handled under "Sugars and Related Substances."

The COURT. Go ahead.

Mr. WILSON. And our contention is that these allegations are wholly immaterial to the issues in this case by virtue of the fact that Congress has, in its revenue acts, specifically designated a certain product, which it says shall be taxed and defines that product, and names it as "candy," and pursuant to that congressional act, the commissioner has set up a definition for taxation purposes, in which the words "milk chocolate" and "sweet chocolate" shall be used and defined as "candy."

It is our contention that whatever authority the Department of Agriculture may have, it is wholly immaterial. We do not deny it, but we do not see where it has any place in these cases. The fact that in the Depatment of Agriculture "candy" and the other term that was used, "sugars and related substances," are in a

separate and distinct classification, may be changed, does not take away from Congress, in 1918, the right to say that a certain product, "candy," may be taxed, nor does it take away from the Commissioner of Internal Revenue, under the authority that is vested in him by the internal-revenue acts, the right to so treat sweet milk chocolate.

Mr. MASON. With your honor's permission and with the consent of the Government, in view of the argument that has been advanced by Mr. Wilson, I am going to amplify the offer.

The COURT. How are we on the record? Has this offer been objected to on the ground that it is immaterial?

51 Mr. MASON. As I understand, the Government has objected to the admission of paragraphs 7, 8, and 9 in the case that I read from, and to the other statements in the other cases of a similar nature, on the ground of irrelevancy.

In view of the fact that it was my purpose later to elaborate those averments by offering the full circulars—the standards and the definition—so that the record would be complete, I will offer those now, and I understand the Government makes the same objection.

Mr. WILSON. Yes.

Mr. MASON. The Government makes the same objection to those offers, and I will direct my answer to the Government's objection.

The offer, which is now made, is the offer of the——

Circular No. 10, issued by the Department of Agriculture, on November 20, 1903, entitled "Standards of Purity for Food Products";

Circular No. 10, issued by the Department of Agriculture, on December 20, 1904, entitled "Standards of Purity for Food Products";

Circular No. 17, issued by the Department of Agriculture, on March 8, 1906, entitled "Standards of Purity for Food Products";

Circular No. 19, issued by the Department of Agriculture, on June 26, 1906, entitled "Standards of Purity for Food Products";

Circular No. 136, issued by the Department of Agriculture, on May 14, 1919, entitled "Standards of Purity for Food Products";

A certified copy of what is entitled "Food Inspection Decision 165" (generally known as "F. I. D."), issued by the Secretary of Agriculture, February 15, 1916; and

A similar food-inspection decision, No. 191, issued by the Department of Agriculture, January 19, 1923.

(Papers in question marked Plaintiff's Exhibits 1 to 7, respectively, both numbers inclusive.)

Mr. MASON. Those include a statement and make reference 52 to the authority on which action was taken by the Secretary of Agriculture, and form the basis for the promulgation of those circulars and decisions.

That authority goes back to the act of June 3, 1902, which is to be found in 32 Statutes at Large, 286, on page 296, in which Congress states: That the authority was given and the appropriation was

made, as set forth in that act, to enable the Secretary of Agriculture, in collaboration with the Association of Official Agriculture Chemists and such other experts as he may deem necessary, to establish standards of purity for food products, and to determine what are regarded as adulterations therein for the guidance of the officials of the various States and of the courts of justice.

Pursuant to that authority, the Secretary secured the assistance of various official bodies, those who participated in the compilation of the standards and the definitions being referred to in the official documents issued by the Secretary, and included in them was Dr. Charles A. Crampton, chemist for the Bureau of Internal Revenue, as well as the representatives of the various organizations throughout the country, competent to express opinions concerning the products covered by the regulations, and competent to aid in making a definition for them.

Your honor will find in these official documents that there is given the classification to "chocolate" in the regulations, that were in force at the time the act of 1918 was passed and "candy," which clearly differentiates the two products, and having been so classified and having been defined, as you will see in those regulations, we have, by authority of Congress itself, a designation for the one and for the other, which separates them as different things, and those classifications having been made pursuant to the authority given by Congress in 1902, being in force in 1918, being compelled upon all the other departments concerned with the law applicable to the subject matter of the regulations, they are offered here as evidence to establish the fact that at the time the act of 1918 and the act of
53 1921 were passed, there was in the mind of Congress, as a result of the action taken pursuant to this authority, a clear distinction between "candy" and "sweet chocolate," and for that reason and for the further reason that not only was Congress thereby guided, but as the acts themselves said, they were for the guidance of the courts of justice—and we are now in a court of justice—we think it is most appropriate that they should be made a part of the record in this case, as an aid to determining what is the meaning that Congress gave to the word "candy" when it adopted that designation as the basis for classification and taxation.

The Court. The ruling of the court will be reserved on this question. Proceed with the case.

(Copies of the paragraphs in Plaintiff's statement of claim, heretofore referred to, follow:)

54 1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at York, in the County of York, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the First District

of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located at all the times hereinafter mentioned.

3. During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of one hundred and six thousand eight hundred and twenty-five dollars ($106,825.00), and during the period from January 1, 1922, to June 30, 1924, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of one hundred and ninety-eight thousand and forty-nine dollars ($198,049.00).

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9) did, for the periods aforesaid, assess excise taxes against the plaintiff aggregating eleven thousand two hundred and eighty-two and 61/100 dollars ($11,282.61).

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of said sales of
55 sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, a tax of eleven thousand two hundred and eighty-two dollars and sixty-one cents ($11,282.61), being five per centum (5%) of the amount of said sales of one hundred and six thousand eight hundred and twenty-five dollars ($106,825.00) and three percentum (3%) of amount of said sales of one hundred ninety-eight thousand forty-nine dollars ($198,049) payments being made as follows:

Date of payment	Amount paid
July 30, 1921	$289.08
August 30, 1921	174.03
September 29, 1921	407.86
October 31, 1921	1,264.25
November 30, 1921	1,602.33
December 29, 1921	1,227.84
January 31, 1922	375.74
February 27, 1922	448.09
March 30, 1922	250.09
April 28, 1922	165.73
May 29, 1922	132.90
June 29, 1923	143.94
July 29, 1922	209.70
August 30, 1922	227.08
September 29, 1922	279.13
October 30, 1922	554.97
November 29, 1922	558.80
December 29, 1922	598.63
January 30, 1923	247.07
February 27, 1923	359.91
March 30, 1923	$194.39
April 28, 1923	177.51
May 29, 1923	104.50
June 29, 1923	100.61
July 30, 1923	68.84
August 30, 1923	35.94
September 28, 1923	48.77
October 26, 1923	195.00
November 21, 1923	315.01
December 17, 1923	143.63
January 19, 1924	34.40
February 19, 1924	64.52
March 20, 1924	46.87
April 24, 1924	94.69
May 19, 1924	52.77
June 19, 1924	42.24
July 22, 1924	45.74
	11,282.61

8. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists and such other experts as he may deem necessary, pursuant to authority given him by acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products together with their
56 precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

9. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture superseding its earlier circulars Nos. 10–13–17, and 19, on the same subject to the same effect and contains the following:

(Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products."

"c. Cacao Products."

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundreds per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.
57 "5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cacao butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

"10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat-free residue of chocolate.

"11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

10. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and Related Substances," under which classification is included "candy" and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "c. Candy," which is therein defined as "a product made from a saccharine substance or substances."

11. There is no authority vested by act of Congress or otherwise in the Secretary of the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America.

13. The plaintiff, in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. On or about August 28, 1923, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the claims for refund of amounts aggregating $10,117.40 were rejected. A copy of the said notice of rejection is attached hereto as Exhibit B. On or about January 20, 1925, the plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the claims as tabulated on Exhibit A hereto attached were rejected. A copy of said notice of rejection is attached hereto as Exhibit A.

14. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

Mr. MASON. In order that we will have here for record purposes a reference to the statements under consideration, sir, I will call your honor's attention to the revenue act of 1918, Title IX, section 900, subdivision (9), to be found in 40 Statutes at Large, 1157, page 1122; that section, as it stands, reading "Candy, 5 per cent."

The provision of the revenue act of 1918, under this title, imposing the taxes that were provided for in the various following sections and subsections, reads—as I shall give it to your honor in just a minute—"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, pro-

ducer, or importer, a tax equivalent to the following percentages of the price for which sold or leased," that language being the language with which Title IX, section 900, starts, subsection (9) of that section providing the percentage for candy as 5 per centum.

In view of the fact that, in addition to the act of 1918, these cases involve the provisions of the act of 1921, we call your honor's attention to certain legislative history of the act of 1921, and we desire to offer in evidence, so that it may be upon the record, even though your honor may take judicial notice, this is to have it available for record purposes, the proceedings of certain hearings before the Senate Finance Committee, engaged in the work of promulgating the act of 1921. We offer in evidence a certified copy of so much of the public hearings before the Senate Finance Committee, held May 9 and May 27, 1921, which relates to the proposed tax on candy, as set forth on pages 697 to 703 of the printed reports of those proceedings, the certificate being made by Elmer W. Pratt, clerk of the Committee on Finance.

Mr. WILSON. What is the purpose of your offer?

Mr. MASON. Counsel for the Government asks us for the purpose of that offer.

The COURT. You did state that.

Mr. MASON. I tried to make clear that the purpose of this offer and the subsequent offers will be to try to establish the legislative history of the act of 1921.

60 The COURT. Surely.

(Paper in question marked "Plaintiff's Exhibit 8.")

Mr. MASON. Your honor will recall that the act of 1918 provided for a tax upon candy. When the act of 1921 was under consideration, as shown by this particular report, there were a number of witnesses who presented to the Senate Finance Committee the scope of the previous enactment and complained of the manner in which that statute had not reached competitive products, and among those who raised the question, that there was a failure by then existing legislation to equalize the taxation, by reason of the fact that certain products were taxed and certain products were not taxed, were the representatives of the National Confectioners Association, called upon to speak for the candy manufacturers, and in the course of their presentation of the problem, which the candy manufacturers had under the then existing act, and in support of a request that there should be an equalization of competitive industries, the candy manufacturers called the attention of the Senate Finance Committee to the fact that sweet chocolate was a product in competition with candy, which was not then subject to taxes.

Your honor will find in the argument not only the general language used to show the manner in which chocolate and other products competed with candy, but you will find the statement made, in the first instance, by Mr. Fuller, and, again, my recollection is, by Mr. Price that under the decision of the United States Court in

Massachusetts, it had been decided that the act of 1918, levying a 5 per cent tax upon candy, did not levy a tax of a similar amount or any amount upon sweet chocolate, which was a competitor of candy. That matter is brought to the attention of the Senate Finance Committee in this language; Mr. Fuller, speaking on page 699, says this:

"Many articles made from the same ingredients pay an excise tax when manufactured by candy manufacturers, but no specific taxes when manufactured by others, such as cake and cracker manufacurers. Examples of this are stuffed dates, with which you are familiar, fig-filled newtons, salted peanuts, chocolate bars, etc.

"The United States District Court of Massachusetts has just held that sweet chocolate bars—not the bitter chocolates used by housewives for cooking—are not subject to the 5 per cent excise tax. These bars are universally sold in direct competition with candy paying the 5 per cent excise tax.

"These are the sort of bars to which I refer [indicating samples] and which you see sold constantly in drug stores and news stands.

"Senator WATSON. Was that question tested in the courts?

"Mr. FULLER. In the United States District Court of Massachusetts, Senator Watson.

"Senator DILLINGHAM. In that popular way they are sold as candy?

"Mr. FULLER. Yes, sir; and they are sold in competition with candies universally. These bars are universally sold, as I have stated, in direct competition with candy which pays the 5 per cent excise tax."

Page 701, Mr. Price speaking also, for the Manufacturers Association, and as president of the National Candy Company, calls the committee's attention to the fact, in his words:

"It has been recently held by the Massachusetts courts that a chocolate manufacturer may take a piece of chocolate and put a nut in it and it is a food and not subject to tax. We take a nut and coat it with chocolate and it is subject to tax.

"All of these items come in direct competition with candy."

During the hearings upon the revenue act of 1921, the hearings before the House's Ways and Means Committee afford a part of the legislative history of that act, and we offer so much of the hearings of the Committee on Ways and Means—a report of which is certified to by Clayton F. Moore, clerk of the Committee of Ways and Means—as relates to the subject matter of the inquiry before your honor, and reading from page 252 to page 258 of that report, I call your honor's attention to the fact that before the House's Committee of Ways and Means the representatives of the candy manufacturers presented the same request to the House as they presented to the Senate for a protection to the candy manufacture's from the competition of products sold in competition

with candy, and not bearing a tax, and emphasized the fact to the members of the Ways and Means Committee that chocolate—sweet chocolate, in the form sold in competition with candy, did not bear the excise tax. The language that I am reading is the language of Mr. Fuller, beginning on page 252:

"It had been my intention, gentlemen, but circumstances manifestly would not permit that, to erect here before you a counter such as you see in the small neighborhood stores, the general country stores, and the 5 and 10 cents stores, because that is where the great bulk of candy is sold, and I would put in that counter these various pieces of candy, in the form in which they are sold, bulk goods, marked as 120 count goods, three for a penny, two for a penny, and so on.

"Congressman FREAR. You are urging that they be taxed the same as on the candy, as I understand?

"Mr. FULLER. I would say, conversely, Mr. Frear, we are urging that we be not taxed when we are forced to sell our articles in competition with those articles; and I would put in that counter tops, toy balloons, squawkers, marbles, glass agates——

"Mr. FREAR (interposing). Baseballs and bats?

"Mr. FULLER. Yes, sir; and these other things that sell for a penny, or a nickel, or a dime. I wish, gentlemen, we could take a child into a store in your presence and give that child a nickel and you could see the child consume half an hour or an hour of the time of the proprietor of that store shopping. Gentlemen, the child is the champion shopper of the country, and he will determine then whether he is getting a penny's worth, or a nickel's worth, or a dime's worth of candy, or whether he is going to go out and buy something that is not paying any of these taxes, such as the tops or the squawkers or the marbles, or these other things."

63

The COURT. He is not interested in quality, but more in the quantity.

Mr. MASON. The most for the money.

The COURT. Yes, cough drops are very popular.

Mr. MASON.

"I have already referred to the fact that many articles which are manufactured by candy manufacturers pay a tax, while the same articles can be manufactured and sold by bakers and cracker manufacturers without paying a tax. Furthermore, the United States District Court of Massachusetts has just held that the sweet chocolate bars, the small sweet chocolate bars with which you are familiar—are not a candy, and that therefore they are not subject to this 5 per cent manufacturers' tax, and yet they are sold in all these stores, and at news stands, and on the trains, etc., in direct competition with candy.

"Mr. FREAR. Would it help matters if we taxed them?

"Mr. FULLER. It would help matters to this extent, Mr. Frear, it would put everybody on the same competitive level; but it would

not be fair for us to come here, I think, and suggest that you tax other items, because of the manifest criticism of an industry.

"Mr. FREAR. That is not the question. We have got to raise the taxes from some source and we want to find out what your recommendations are.

"Mr. YOUNG. Your recommendation is to take it off your product.

"Mr. FULLER. Yes, sir.

"Mr. YOUNG. And if not, then you think it ought to be put on competitive products?

"Mr. FULLER. I do not like to say that, Mr. Young. I would much rather the committee would draw its own conclusions."

(Book in question marked "Plaintiff's Exhibit 9.")

64 Mr. MASON. Following that your honor will take judicial notice of the fact, and from these reports you will see that the committees reported the act of 1921 in a form which should not include a tax upon sweet chocolate or sweet milk chocolate. There was, however, a plan in the act that as reported, as your honor will see from the various Congressional Records of that time, a change in the tax on candy, and a change that provided for a similar graduated tax based upon the price of candy, but referring to the products taxed as candy, and not as sweet chocolate, and not in conjunction with sweet chocolate, nor including sweet chocolate in it, the language being identical with the language of the act of 1918, in so far as that commodity is concerned.

The COURT. What kind of a tax is that?

Mr. MASON. They proposed a graduated tax that would ultimately impose a tax of ten per cent upon candy selling at a maximum price, but the commodity that was to be taxed was still candy with no additions to that word. There was considerable debate in the House and Senate as to whether or not the candy industry could stand more than the smaller tax, and there was a committee amendment proposed that would change the method of taxing, as originally suggested. That debate extended over some substantial period of time.

I desire to offer from those debates, as part of the legislative history of the act of 1921, so much of the debates as are reported in the Congressional Records for the 67th Congress, first session, as of Tuesday, November 1, 1921, being in volume 61, and to be found on pages 7879, in so far as it relates to the subject matter of this hearing; the volume also carries a number; the volume carries 61, No. 144. The page to which I have reference is 7879, without reading the entire debate, sir. Following the general debate upon the quantum the tax on candy should cover, there was a discussion as to whether or not it covered certain commodities also, and on page 7879, in answer to inquiries made by Senator Reed of Missouri, who is always inquisitive, Senator LaFollette stated: "Sweet chocolate is not taxed as candy at all. It is not candy and is not so taxed."

65 "Mr. REED. I thank the Senator. I am perfectly content to have the law stand as it is; but if we are going to vote on the other proposition, I would like to have it voted on in the manner I have suggested."

I might say, sir, that Senator Reed had suggested an amendment to the committee amendment. Further on, in the same debate and reported on the same page, Senator Willis made this inquiry:

"Mr. President, I desire to ask the Senator from New York a question. I do not desire to be misunderstood in my attitude on this. I am in favor of the reduction of this tax, but what I can not understand is why the Senator's committee now proposes to make a larger comparative reduction in the higher grades of candy than is proposed for the lower and cheaper grades of candy. Why should that be done?

"Mr. CALDER. Mr. President, in the committee I voted for the three per cent tax on all candies. I never agreed that ten per cent was wise, and I do not now, and in line with the statement of the Senator from Massachusetts (Mr. Walsh), in my opinion, it would be inequitable and would work a great hardship on the higher and better grades of candy if the ten per cent tax is levied.

"Mr. MCLEAN. I call the attention of the Senator to the prime reason why those of us who are opposed to that amendment thought we ought not to tax the higher grades of candy. For instance, sweet chocolate is not taxed at all, but it comes in competition with chocolate candy, it answers practically the same purpose, so we felt that it was unfair to tax the chocolate candy and let the sweet chocolate monopolize the market.

"Mr. CALDER. That is another excellent argument.

"Mr. MCLEAN. I think that is the prime reason.

"Mr. REED (from Missouri). Mr. President, it seems to me there is a peculiar dearth of argument here or else a plentitude that is so massive that I cannot grasp it. The first appeal was for sweet chocolate for the soldiers who had marched in France some
66 three years ago. That necessity does not exist any more. Now it is discovered that sweet chocolates are not taxed at all.

"Next we heard about the poor clerks and stenographers who had to make their dinners off of it, and now an appeal that would wring tears from the eyes of a marble statue is made for the poor fellow who has had his whisky taken away from him and is about to have his candy taxed. What a heart-rending thing it is when one contemplates it! Here is an old jag walking down the street with his tongue dry, longing for the thing that has passed away apparently forever, who goes into a candy store and buys a pound of candy which costs twenty cents, and which is taxed six mills, and that is to close the curtain on the window of his happiness, and he is to see the sunlight of joy no more. That is a funny argument."

In the course of the Senate hearing, sir, and the House, further debates took place, which we do not need to offer, because the next

and substantially the important fact, showing the contentions made for the reduction of the tax on candy from the proposed tax to the [illegible] which was subsequently made, of three per cent in 1921, instead of five per cent in the act of 1918, and showing how, as part of the history, that one of the controlling reasons that appears to have influenced the Senators in reducing the tax upon candy, was this contention, that other things did not bear the tax at all.

(The court here announced a recess of ten minutes.)

(The court at 12.10 o'clock p. m. thereupon reconvened.)

Mr. MASON. Now, sir; we would like to follow the legislative history another step by offering in evidence, certified by the clerk of the Committee on Ways and Means, "Notes on the Revenue Act of 1918, submitted by the Secretary of the Treasury, without recommendation at this time," is the way in which the pamphlet is entitled.

The COURT. What is it, his message to the Ways and Means Committee?

Mr. MASON. His submission to the Ways and Means Committee on November 3, 1919, addressed to the chairman of the Committee on Ways and Means, Honorable Joseph W. Fordney, for the purpose of embracing in the history of the act of 1921 so much of the suggestions which, as the Secretary of the Treasury says, are not at that time recommendations as appear on page 34, in relation to section 900, subsection (9), tax on candy, reading as follows:

"This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.

"It has been suggested that the term 'candy' should be defined.

"The following definition of the term 'candy' is suggested:

"Strike out subdivision (9) and insert:

"Candy, 5 per centum. Candy within the meaning of this subdivision—

"(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruits and nuts not specified in paragraph (b) of this subdivision, pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, sweetened licorice not taxed as cough drops under section 907, sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated; but

"(b) Does not include cereal breakfast foods, cake, and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, nor glace or candied fruits purchased for and used in the manufacture of food products, such as ice cream, cakes, and pastries."

(Paper in question marked "Plaintiff's Exhibit 11.")

68 Mr. MASON. Then, we call your honor's attention and suggest the inclusion in the record of the provision of the act of 1921, as passed, Title IX, excise taxes, section 900, reading: "That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentages of the price for which so sold or leased: Subsection VI, Candy, 3 per centum."

The COURT. That is the same as the act of 1918?

Mr. MASON. Exactly the same as the act of 1918, without the addition of the suggested definition which Secretary Glass said had been proposed and without anywhere in the act of 1921 imposing a tax upon sweet chocolate or sweet milk chocolate or using the general language to include such related subjects in the term of candy or any other taxed substance under the act.

For the purpose of showing the intent of Congress in the use of the word "candy" and as an easy way of bringing previous legislation to your honor's attention, we have prepared here a legislative history beginning with the tariff act of August 10, 1790, showing the use of the words "candy," "chocolate," "sweet chocolate," and "sweet milk chocolate" by Congress; from that time down to the tariff act of September 21, 1922, including not only tariff acts but internal revenue acts, such as the war acts of the 1860's and one of the later statutes combining the revenue and tariff provisions, and we submit it to your honor in this printed form, and suggest that in that form, for easy reference, it be added to the record. Of course, it is not necessary to offer in evidence acts of Congress, but as it happens to be an easy method of substituting a few pages for many volumes, we suggest that in the printed form, in which it is now presented to the court, that it be added to the record, without being copied by the stenographer. We will furnish sufficient printed copies to take care of the record in each case. I understand that that is not objected to by counsel. It will make it a little bit easier for you.

69 Mr. WILSON. No.

Mr. MASON. In line with the last suggestion, sir, and to make of easy access the content of the standards of purity of food products, which have been offered in evidence in bulk, we have excerpted the relevant parts of the various documents and put them in the same form that we will put the acts of Congress, and we will furnish to your honor, and for record purposes, printed copies of those also. Those show from the various circulars and decisions of the department heretofore offered, the definition and standards of candy and chocolate, sweet chocolate, and sweet milk chocolate in parallel columns, showing the way in which the department has handled it.

Mr. WILSON. Of course, our objection goes as to the materiality of that.

Mr. MASON. It is conceded that any objection that the Government has made to the documents in full would, of course, attach to this excerpted copy from those documents, and which is not intended as additional evidence. It is intended as an easy way of ascertaining what is in the original.

(Two papers in question marked "Plaintiff's Exhibits 12 and 13," respectively.)

Mr. MASON. That is the plaintiff's case in chief, and I may say at this time in view of the fact that it was impossible for counsel for the Government and counsel for the plaintiffs to know just exactly how the case might move as to time, or just how far we would get on to-day, I have agreed with counsel for the Government that the Government witnesses might not be called until to-morrow, and for that reason they may not be here, and if they are not here, with your honor's permission, I will consent to an adjournment of the case until to-morrow morning, so that they may be ready.

Mr. WILSON. If the court please, our witnesses are practically all experts, and if we wanted to call them to-day they would not
70 be ready. Subpœnas have gone out and they will not be here until to-morrow, so, with the permission of the court, we will ask that we adjourn until to-morrow.

The COURT. That is perfectly agreeable to me. Do you think that you will be finished to-morrow?

Mr. WILSON. It will be agreeable for us to start a little earlier.

The COURT. I do not like to burden counsel because frequently you want to take care of your correspondence, but so far as I am concerned, nine o'clock is absolutely satisfactory.

Mr. MASON. If it suits my associates, it suits me.

The COURT. If you are all agreed, we will start at nine o'clock.

Mr. MASON. We are quite satisfied here. Your honor asked if the case would be concluded to-morrow. I would be hopeful that it would be. We have a number of witnesses for rebuttal that we may not be able to put on.

The COURT. I do not believe I will be able to sit on Wednesday. There is just one thing I am expecting, a telephone call that may or may not require me to go back to Easton to-night. If I have to go back to Easton to-night, who shall I notify in that event?

Mr. MASON. If your secretary will notify me, I will notify my associates. I will so arrange that all my associates are notified.

(Adjourned until Tuesday, May 22, 1928, at 9.00 o'clock a. m., daylight-saving time.)

Evidence on behalf of defendant

SECOND DAY

Philadelphia, Pa., Tuesday, May 22, 1928, at 9.00 o'clock a. m., eastern daylight saving time.

Mr. WILSON. Before opening the defense, your honor, I would like to make a very brief preliminary statement as to the theory on which the defense is proceeding.

71 The COURT. You want this for the record?

Mr. WILSON. Please.

The COURT. All right.

Mr. WILSON. As stated by me yesterday, the Government contends that the Commissioner of Internal Revenue had full power and authority to make this definition of "candy"—that word having been used in the internal revenue acts of 1918 and 1921—providing such definition was reasonable and reasonably applicable to the subject.

At this time I would like to read into the record the definition promulgated by the Commissioner of Internal Revenue, and under which the taxes herein involved were collected. This definition was promulgated originally on May 1, 1919, by the Secretary of the Treasury, and is referred to as article 22 of the regulations. It originally read as follows:

Mr. MASON. Before you read it, may I ask, for the purpose of the record, whether Mr. Wilson intends to give the basis for that regulation at this time, in view of the fact that in another case the Government did give the basis for it, as the definition suggested by the National Confectioners Association, on behalf of the candy manufacturers, and that was its origin and that was the source from which the Commissioner of Internal Revenue obtained the basis for his definition?

I was wondering if that is to be offered in the record as part of the defendant's case, whether at the same time it ought not to have the history of it and the source of it, but that is for Mr. Wilson.

Mr. WILSON. Of course, the position of the Government in all of these cases is that the origin and the basis of this definition are wholly immaterial in these cases. We are proceeding on the theory that it is a legal, reasonable, and just regulation, promulgated under the authority duly vested in the Commissioner of Internal Revenue, and that the definition, as originally worded, and as amended, is all we are interested in at this time.

The definition reads as follows, or read as follows:

72 "Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruits and nuts, pop corn, and other cereals and cereal products mixed or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops, and sweetened licorice, not taxed as cough drops, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, and all similar articles however designated. It does not, however, include cereal breakfast foods, cake, and pastries, nor bitter chocolate which needs the addi-

tion of sugar before it becomes pleasing to the taste. If a manufacturer of glace or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon, or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer, and on which he has performed no further process of manufacture, the tax attaches only to such portions of the goods sold as have been manufactured by him."

On May 10, 1919——

The COURT. What was the date of the definition?

Mr. WILSON. The original definition was May 1, 1919. That is promulgated as article No. —. I believe that will be article 22 under the regulation 45.

Mr. MASON. Forty-seven.

Mr. WILSON. On May 10, 1919, there was a ruling made by the commissioner, which I shall read. It is very brief.

73 "Sweet chocolate sold in parcels of such a size and shape that it is commonly purchased and consumed as candy by the general public, is taxable as candy, but sweet chocolate sold in large packages, not as candy, but intended for further manufacturing purposes, is not taxable, provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes."

Now, article 22 was revised in December, 1920, to the extent that while still covering permanently sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, by the introduction of another paragraph excluded—

"Sweet chocolate, glace or candied fruits, or nuts sold by the manufacturer used under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold."

So that the addition to or the amendment of the original definition did not affect sweet chocolate and sweet milk chocolate, except as to the forms sold where further manufacture was necessary or done.

Mr. MASON. Mr. Wilson, may I ask whether you are offering the ruling of the commissioner, as of May 10, 1919, as a regulation authorized by the statute?

Mr. WILSON. In answer to the inquiry of counsel, with regard to the ruling of May 10, 1919, which I quoted——

The COURT. What was the inquiry?

Mr. MASON. I inquired as to whether or not Mr. Wilson was offering the ruling of the Commissioner of Internal Revenue of May 10, 1919, as an authorized ruling of the Treasury Department, or as

a mere interpretative opinion of the commissioner. If it is offered as 1st, then I want to object because it is not an authorized ruling of the Secretary, and if the second, I will object to it because it has not the weight of the commissioner's opinion.

Mr. WILSON. It will be offered under the second designation of counsel. In other words, what we offer is an office ruling.

74 Mr. MASON. My reason for making that distinction at this time is because the act of 1918, section 1309, and the act of 1921, section 1303 gave, in these words, the only power that the department had to make regulations "That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act." There is no provision in either act permitting the Commissioner of Internal Revenue or the Secretary of the Treasury to make a definition of an article taxed by Congress.

The COURT. What was the original regulation?

Mr. MASON. The original regulation was section 22 of article 41, under the act of 1918, which was issued by the commissioner with the approval of the Secretary. That was authorized by the Secretary, but there is no foundation in the act for a ruling by the commissioner in the nature of a definition of the word "candy."

Mr. WILSON. Reference was made on several occasions yesterday by counsel, while reading from papers and documents introduced in evidence by him, to a certain case in Massachusetts, in which a decision for the plaintiff company had been entered shortly prior to the discussions which were taking place in the House and the Senate relative to this particular measure. The following remarks will be off the record.

(Remarks off the record.)

If your honor please, the proof to be offered by these witnesses will be in a limited field. Under the theory in which the defense is proceeding in these cases, we expect to offer proof showing how the products of these companies are purchased from factories, how they are handled through the wholesale confectioners, and from them to the retail confectioners, and from them sold to the consumer. That is all the proof that we are going to have. We are contending that these products are candies, and we are going to offer proof to the effect that they are handled in conjunction with other candies, handled as candies and considered as such by the trade and by the consumer.

75 The COURT. They are sold in candy stores and by candy sellers.

Mr. WILSON. Surely.

Mr. MASON. Of course, the proof as to the physical acts of manufacture, and packing and the identity of the individuals to whom sold could not be objectionable at all. We do object, however, to any proof from witnesses in an effort to establish that sweet chocolate and sweet milk chocolate are sold as candy, or with candy, or to

persons also buying candy, because, to my mind, that is totally irrelevant to the issue which is here. The issue, which is here, is whether or not when Congress used the word "candy" that "candy" extended to include a totally different, well known, and highly defined article such as sweet chocolate, and that any evidence of the nature outlined by the offer of proof would be merely evidence of persons who would describe facts going to show what has been outlined, and, if shown, would be of no aid to the court and certainly of no effect as a fact on which to found a judgment of sweet milk chocolate as candy.

The COURT. Are you going to offer evidence to show what the composition of this chocolate is?

Mr. WILSON. If the court please, that is a matter entirely within the knowledge of the plaintiff, and the Government has not had the products analyzed. We can say that we know just in a general way, of course, but as to the exact percentages we can not say at this time.

Mr. MASON. Our thought has been and would be, sir, that the varying quality of products would also be immaterial if the Government were to offer it.

The COURT. I merely inquired whether the proof——

Mr. MASON. I am just carrying the thought until the product is changed and it is no longer just sweet chocolate or sweet milk chocolate. The Government has admitted that articles taxed and on which the tax was paid, for which these suits have been brought to recover what has been paid, are either sweet chocolate or sweet milk chocolate, and going back to the facts, that are already of record here, we have a well-known article, sweet chocolate, a well-known article, sweet milk chocolate, both of which have received a classification, identification, and definition by the authorized arm of the Government through the Secretary of Agriculture and through Congress itself in its legislative history of the tariff and referred to in the acts going all the way through from the year 1790. Therefore it is our thought, sir, that such evidence as the Government has indicated it desires to offer from these witnesses would be interesting but not relevant to the issue that is here.

Mr. WILSON. If the court please, counsel's statement made a moment ago to the effect that the Government admits—to the effect, at least—that the products manufactured by these companies were sweet chocolate or sweet milk chocolate is true to this extent: The allegations of the various statements of claims in these cases allege that the plaintiffs during certain periods of time manufactured and sold certain sweet chocolate and sweet milk chocolate in various forms and sizes. Now, a chocolate cream is a form of sweet milk chocolate, if you want to call it that.

Mr. MASON. Oh, no.

Mr. WILSON. Of course, we have no evidence here. The plaintiffs have taken upon themselves the assumption of the obligation of any testimony. So far as we know, up to the present moment, these products were sweet chocolate and sweet milk chocolate in different

forms and sizes. That is all we know about it. So, when you attempt to talk of sweet chocolate or sweet milk chocolate, as referred to by the Department of Agriculture, where the Department of Agriculture was talking about the purity that a certain product had, so far as the quality was concerned to pass the pure food law, you are talking about an entirely different subject than we are. We are interested in a product that is made up of chocolate, sugar, and flavored in some instances with nuts, a finished product, as distinguished from the raw product, which is ground from the
77 cacao bean. If so, we should not admit that the products here involved are sweet chocolate and sweet milk chocolate as referred to by the Department of Agriculture, because they are not.

The COURT. Really, the purpose of your offer is as to the form in which they are sold, and the places in which they are sold, and so on?

Mr. WILSON. Our theory is that these products, as manufactured, since they contain a special percentage of flavor, of nuts and cream, and whatever is put in them, and since they are sold to the candy trade, to the wholesalers, and sold by them to the retailers, and the consumers, they are within the meaning of the act of 1921 where the term "candy" is used.

The COURT. On that theory, leaving out any question of the regulations of either of the departments, if some product contained a sugar, nothing but sugar, made up in the exact form, and was sold to the candy dealers, sold as candy, on that theory that could be developed to show it was candy.

Mr. WILSON. I do not understand your statement. I am sorry.

The COURT. My thought, following that line and leaving out of consideration all of these regulations—suppose there were no regulations at all, and the question was whether sugar came under the head of "candy" at all, just plain candy and you would offer to prove that ordinary sugar lumps, made up in attractive form, animals, or something of that sort, and sold in candy stores, it would be candy within the meaning of that act.

Mr. WILSON. I would say, in answer to your honor, if ordinary squares of sugar, for instance, domino sugar were dolled up and fixed up in some attractive package, with labels on them, which would be appropriate in a confection in which sugar was carried, and sold in competition with, but also as candy, I would say they were also within the meaning of the act.

(Recess was here taken until 10.15 o'clock a. m.)

78 (After recess.)

LOUIS NEWMAN, having been duly sworn, was examined and testified as follows:

By Mr. WILSON:

Q. Where do you reside? Where do you live?

A. 1826 South Broad Street.

Q. In Philadelphia?
A. In Philadelphia.
Q. In what business are you engaged?
A. Confectionery.
Q. Confectionery?
A. Yes.
Q. And where is your place of business?
A. 255 Market Street.
Mr. MASON. Mr. Wilson, do I understand that Mr. Newhoff has been called for all four cases?
Mr. WILSON. For the Hershey case.

By Mr. WILSON:

Q. How long have you been engaged in the confectionery business?
A. About thirty-two years.
Q. And what portion of that time have you been here; all the time?
A. In that section, about seven years.
Q. Seven years?
A. That's where I am located now.
Q. I mean in Philadelphia.
A. In Philadelphia all the time.
Q. Do you handle any of the products manufactured by the Hershey Chocolate Company, of Hershey, Pennsylvania?
A. Yes, sir.
Q. For how long a time have you handled those products?
A. Since I have—well, it would be about the same time, I believe; something about 25 or 30 years, between that time, because when I started in business Hershey wasn't in the chocolate business then; just about 25 to 27 years, something like that.
Q. What of the Hershey products do you carry?
79 A. We carry practically the complete line.
Q. And what, so far as you can recall now, are the names of some of their products?
A. Well, they are making milk chocolate, making chocolate almond bars, and different other items, but they are all chocolate goods.
Q. They are all chocolate goods?
A. They are all chocolate goods.
Q. You have said that you are in the confectionery business?
A. Yes, sir.
Q. What trade do you supply?
A. We supply the candy stores and drug stores.
Q. Candy and drug stores, generally?
A. Yes; and probably the grocery stores. You know, they are handling the goods.
Q. You supply those lines of business with the Hershey products, do you?
A. I do.

Q. Where do you buy the Hershey products?
A. I get them direct from Hershey.
Q. From the factory?
A. From the factory.
Q. How are those products handled by you?
A. Well, as chocolate.
Q. As chocolate?
A. Right.
Q. Your place is advertised as what?
A. As a confectionery.
Q. You handle that stuff as chocolate confectionery, do you?
A. We handle the confectionery line, but there are different varieties in confectionery, but anybody can come in and ask for the particular item. For instance, if they ask for chocolate, I am going to give them chocolate.
Q. Your line, however, is limited to confectionery of all kinds?
A. Of all kinds.
Q. You supply the confectionery trade?
80 A. Exactly.
Q. Do you know, of your own knowledge, whether wholesale confectioners in this community, generally, handle Hershey products? Do you know, of your own knowledge, whether they do?
A. Why, naturally. I believe the majority of jobbers in the confectionery line handle Hershey goods. It is a very prominent item.
Q. You know a great many who do?
A. Sure.
Q. And those products are handled by those men in the confectionery department—in the confectionery field?
A. Yes, sir.

Cross examination by Mr. MASON:

Q. Do you handle nuts of any kind? Do you handle salted nuts?
A. We do.
Q. And you handle salted peanuts?
A. We do.
Q. Salted almonds?
A. Not exactly. The most we do handle are salted peanuts.
Q. And those are handled in the confectionery trade?
A. Some will handle them, and some will not handle them.
Q. You, yourself, do handle them?
A. I do.
Q. Do you handle dates?
A. No; we do not.
Q. Do you handle stuffed dates of any kind?
A. Sometimes, but not all the time. I don't consider it as an item.
Q. Do you handle prunes of any kind?
A. We do sometimes.

Q. Do you handle candied fruit of any kind?

A. What do you mean by "candied fruit"?

Q. What kind of candied fruit do you handle?

61 A. We would say, "candy fills." That would be different kinds of fruit. We do handle them.

Q. Do you handle raisins of any kind?

A. We do.

Q. There is quite a large demand for raisins in the confectionery trade, is there not?

A. Well, it is quite a seller.

Q. And raisins are put up in small boxes, and they are eaten by various people who buy them in the boxes, are they not?

A. Yes, sir.

Q. Do you handle what are called "chocolate covered crackers"—the various confections that are put out by the bakers?

A. Yes, sir; I do.

Q. Those small cakes——

A. Yes; they are put up in five-cent packages, chocolate coated; yes, sir.

Q. I am wondering if you also handle those various small toys, balloons, nicknacks of that sort?

A. Well, that is no item; just——

Q. Just a side line?

A. Just on the side.

Q. But you sell them to the confectionery trade, do you not?

A. Oh, yes. I don't know who is buying them, whether it is confectioners or retailers.

Q. The small stores?

A. Yes, sir.

By the COURT:

Q. That is, you sell them?

A. We do.

By Mr. MASON:

Q. Mr. Wilson asked you whether the wholesale confectioners handled Hershey's sweet chocolate and sweet milk chocolate.

A. Yes, sir; they do; oh, yes.

62 Q. The tobacco stores also handle Hershey's products, do they not?

A. Yes; they do.

Q. And the wholesale drug jobbers handle Hershey products?

A. Yes; they do.

Q. And the wholesale grocery jobbers handle Hershey products, do they not?

A. Yes, sir.

Q. And what they handle and what you handle are Hershey's sweet chocolate and sweet milk chocolate?

A. Exactly.

Redirect examination by Mr. WILSON:

Q. Your main lines in your store are candies; that is what you mean?

A. Why, the general line.

Q. You are in the candy business, the wholesale business?

A. The wholesale business.

Mr. WILSON. I want to pursue the same line of examination in regard to the Wilbur products.

Mr. MASON. I understand the witness is now being examined in the Wilbur cases. Do you agree, Mr. Wilson, that this testimony will apply to all of the cases?

Mr. WILSON. All right, that will be very agreeable.

Mr. MASON. It is agreed by counsel for the plaintiffs and counsel for the Government that the testimony just given by the witness in relation to the Hershey cases shall apply to the other three plaintiffs, and that it is to be assumed that it would be the same in relation to the sweet chocolate and sweet milk chocolate manufactured and sold by the other three plaintiffs as it has been in relation to the Hershey sweet chocolate and sweet milk chocolate, and that his cross examination and his answers therein would be the same.

Mr. WILSON. That is all, Mr. Newhoff.

83 Mr. WILSON. If the court please, that is all the testimony from the defense at this time.

The defendant rests, your honor.

Mr. MASON. If your honor please, the plaintiffs will also rest, so that the record is now complete for your honor.

(Argument set for Thursday, June 7, 1928, at 10.00 o'clock a. m., daylight saving time.)

And thereafter counsel for the plaintiff and counsel for the defendant respectively made requests of the said court for findings of fact and conclusions of law; which requests for finds of fact and conclusions of law respectively were as follows:

84 *Plaintiff's request for findings of fact and conclusions of law.*

[Title omitted.]

FINDINGS OF FACT

The plaintiff, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows:

1. The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at York, in the county of York, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

2. The defendant at all of the times hereinafter mentioned was the United States collector of internal revenue for the first district

of Pennsylvania, in which district the plaintiff's principal place of business as aforesaid was located at all of the times hereinafter mentioned.

3. During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of one hundred and six thousand eight hundred and twenty-five dollars ($106,825.00), and during the period from January 1, 1922, to June 30, 1923, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of one hundred and ninety-eight thousand and forty-nine dollars ($198,049.00).

4. The collector of internal revenue, the defendant above named, purporting to act under and by virtue of the authority of the revenue act of 1918, Title IX, section 900 (subdivision 9) did, for the periods aforesaid, assess excise taxes against the plaintiff aggregating eleven thousand two hundred and eighty-two and 61/100 dollars ($11,282.61).

5. In order to avoid the imposition of threatened penalties prescribed by the Commissioner of Internal Revenue and by the statutes of the United States, but not lawfully collectible against the plaintiff, the plaintiff made a return of the amount of said sales of sweet chocolate and sweet milk chocolate hereinbefore stated, involuntarily and under protest, and at the times hereinafter set forth paid involuntarily and under protest to the defendant, as collector of internal revenue as aforesaid, a tax of eleven thousand two hundred and eighty-two dollars and sixty-one cents ($11,282.61), being five per centum (5%) of the amount of said sales of one hundred and six thousand eight hundred and twenty-five dollars ($106,825) and three per centum (3%) of amount of said sales of one hundred ninety-eight thousand forty-nine dollars ($198,049) payments being made as follows:—

Date of payment	Amount paid	Date of payment	Amount paid
July 30, 1921	$289.06	February 27, 1923	$359.91
August 30, 1921	174.03	March 30, 1923	194.39
September 29, 1921	407.86	April 28, 1923	177.51
October 31, 1921	1284.25	May 29, 1923	104.50
November 30, 1921	1602.33	June 29, 1923	100.61
December 29, 1921	1227.84	July 30, 1923	68.84
January 31, 1922	375.74	August 30, 1923	85.94
February 27, 1922	448.09	September 28, 1923	48.77
March 30, 1922	250.09	October 26, 1923	195.00
April 28, 1922	165.73	November 21, 1923	315.01
May 29, 1922	132.90	December 17, 1923	143.63
June 29, 1922	148.94	January 19, 1924	84.40
July 29, 1922	209.70	February 19, 1924	64.52
August 30, 1922	227.08	March 20, 1924	46.87
September 29, 1922	279.13	April 24, 1924	94.69
October 30, 1922	554.97	May 19, 1924	52.77
November 29, 1922	558.80	June 19, 1924	42.24
December 29, 1922	593.63	July 22, 1924	45.74
January 30, 1923	247.07		
			$11,282.61

86 6. The Secretary of Agriculture of the United States, in collaboration with the Association of Official Agricultural Chemists and such other experts as he may deem necessary, pursuant to authority given him by the acts of Congress of June 3, 1902, March 3, 1903, supplements and amendments thereto and thereof, and other legislation or authority, was authorized to establish standards of purity for food products and to define and classify the same for the guidance of the officials of the various States and of the courts of justice. The standards of purity of food products, together with their precedent definitions established by the Secretary of Agriculture, pursuant to such authority, are the official definitions and standards of such food products for the United States of America.

7. The definitions and standards of purity for food products established and officially promulgated by the United States Department of Agriculture in force as of May 14, 1919, and continued in force during the period when the sales heretofore referred to were made by the plaintiff, are set forth in Circular 136 of the United States Department of Agriculture superceding its earlier circulars Nos. 10 [illegible] 17 and 19, on the same subject to the same effect and contains the following:—

(Circular No. 136, page 18)

"E. Tea, Coffee, and Cacao Products"

"c. Cacao Products"

"1. Cacao beans, cocoa beans, are the seeds of the cacao tree, Theobroma cacao L.

"2. Cacao nibs, cocoa nibs, cracked cocoa, is the roasted, broken cacao bean freed from its shell or husk.

"3. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, is the solid or plas-
87 tic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ.

"4. Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings, contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat.

"5. Sweet chocolate, sweet chocolate coatings, is chocolate mixed with sugar (sucrose), with or without the addition of cacao butter, spices, or other flavoring materials.

"6. Sweet chocolate, sweet chocolate coatings, contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate.

"7. Cocoa, powdered cocoa, is cacao nibs, with or without the germ, deprived of a portion of its fat and finely pulverized.

"8. Cocoa, powdered cocoa, contains percentages of ash, crude fiber, and starch corresponding to those in chocolate after correction for fat removed.

"9. Sweet cocoa, sweetened cocoa, is cocoa mixed with not more than sixty per cent (60%) of sugar (sucrose).

"10. Sweet cocoa, sweetened cocoa, contains in the sugar and fat-free residue no higher percentage of ash, crude fiber or starch than is found in the sugar and fat-free residue of chocolate.

88 "11. Milk chocolate, milk cocoa, sweet milk chocolate, or sweet milk cocoa, respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

8. The said definitions and standards of purity for food products promulgated and published by the United States Department of Agriculture do not classify sweet chocolate and sweet milk chocolate under the class of "C. Sugars and related substances," under which classification is included "candy" and the said definitions and standards do not classify sweet chocolate and sweet milk chocolate under the subclassification therein contained of "n. Candy," which is therein defined as "a product made from a saccharine substance or substances."

9. There is no authority vested by act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, standards of purity, or classifications of food products for the United States of America.

10. The plaintiff, in accordance with the provisions of the act of Congress and the regulations of the Commissioner of Internal Revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes erroneously and illegally collected. The plaintiff was duly notified by D. H. Blair, Commissioner of Internal Revenue, that the claims were rejected.

11. The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

12. Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

89 13. Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States.

14. Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent, (12%) of whole milk solids in the finished product.

15. Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health,

or any vinous, malt, or spirituous liquor or compound, or narcotic drug.

16. Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy.

17. Sweet chocolate and sweet milk chocolate are not candy.

CONCLUSIONS OF LAW

The plaintiff requests the court to make the following conclusions of law:

1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

90 2. The revenue act of 1921, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine.

3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921.

4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant.

5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest.

D. F. MAGEE,
WM. CLARKE MASON,
Attorneys for Plaintiff.

91 *Defendant's Request for Findings of Fact and Conclusions of Law*

[Title omitted.]

FINDINGS OF FACT

The defendant, considering the facts hereinafter set forth to be proven, requests the court to find the same as follows:

I

The plaintiff is a corporation duly organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal place of business at York, in the county of York, Pennsylvania, and is and was at the time herein set forth a manufacturer of sweet chocolate, sweet milk chocolate, and other chocolate products.

II

The defendant in all of the times hereinafter mentioned was the United States collector of Internal revenue for the first district of Pennsylvania, in which district the plaintiff's principal place

of business as aforesaid was located at all of the times hereinafter mentioned.

III

During the period from June 1, 1921, to December 31, 1921, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms
92 and sizes, having a total selling price of one hundred and six thousand eight hundred and twenty-five dollars ($106,825.00), and during the period from January 1, 1922, to June 30, 1923, both dates inclusive, the plaintiff sold to its customers certain sweet chocolate and sweet milk chocolate in various forms and sizes, having a total selling price of one hundred and ninety-eight thousand and forty-nine dollars ($198,049.00).

IV

The defendant above named, acting under and by virtue of the authority of section 900 (subdivision 9) of the revenue act of 1918, and section 900 (subdivision 6) of the revenue act of 1921, did, for the periods aforesaid, collect excise taxes from the plaintiff, in the aggregate sum of eleven thousand two hundred and eighty-two and 61/100 dollars ($11,282.61).

V

The plaintiff, in accordance with the provisions of the act of Congress and the regulations of the commissioner of internal revenue thereto appertaining, filed its claims for refund for payment to it of the amounts of the said taxes so collected. The plaintiff was duly notified by D. H. Blair, commissioner of internal revenue, that the claims were rejected.

VI

The defendant has refused to pay to the plaintiff the whole or any part of the said sum.

CONCLUSIONS OF LAW

The defendant requests the court to make the following conclusions of law:

I

The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

93 II

The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

III

The defendant is entitled to judgment.

GEORGE W. COLES,
United States Attorney, Attorney for Defendant.

94 And thereafter, to wit, on November 22, 1928, the said Court filed an Opinion embodying Findings of Fact and Conclusions of Law which follows (in the form revised by the Court as indicated by the opinion of January 17, 1929) viz:

Opinion of the court

Filed Nov. 22, 1928

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania

This is one of sixteen cases which by agreement of the parties were tried together by the court without a jury. The actions were instituted by the plaintiff and three others for the recovery of the amounts named in the several statements of claim, paid under protest to the defendant collectors, as excise taxes on candy, under the provisions of Title IX, sec. 900 (9) of the revenue act of 1918 and Title IX, sec. 900 (6) of the revenue act of 1921, and all the suits involve the general question whether certain sweet chocolate products manufactured and sold by the plaintiffs are candy within the meaning of that word as used in the acts referred to. In this particular case the entire tax sought to be recovered was paid under the Act of 1921, but the conclusions reached will apply equally to taxes paid under the act of 1918, and the case has been selected, as typical, for an opinion.

The relevant provision of the revenue act of 1918 is as follows:

"That there shall be levied, assessed, collected and paid upon
95 the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages for the prices so sold or leased."

* * * * * * * *

"(9) Candy, 5 per centum."

The corresponding section of the revenue act of 1921 is exactly the same except that the rate is 3% instead of 5%.

Regulations promulgated May 1, 1919, by the Commissioner of Internal Revenue excluded from a list of articles enumerated as taxable under sec. 900 (9) of the act of 1918, sweet chocolate "sold in large packages not as candy but intended for further manufacturing purposes * * * provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes." By a revision dated December 27, 1920, and by a subsequent regulation of January 6, 1922, the form of the exclusion was altered to read "sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold." It is conceded that the product as to which the tax in question was paid does not come under the foregoing excluded classes. It is also conceded that all of the products in question were either sweet chocolate or sweet milk chocolate.

The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. Some of the names given by the plaintiffs to their products are: "Solid chocolate bon bons," "chocolate kisses," "chocolate delights," "sweet milk chocolate pats," "chocolate cigarettes," "croquettes," "buds," "wafers," "almond bars," and the like. One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. It is also common knowledge that the products in question are usually consumed in the same manner as candy, that is eaten in small quantities from the hand as a sweetmeat.

The argument for the plaintiff, presented with exceptional ability, is based upon (1) certain regulations promulgated by the Secretary of Agriculture under the authority given to him by the act of Congress of June 3, 1902; (2) the legislative history of the act of 1921; and (3) the legislative construction of the word candy to be found from the manner in which it has been used in prior tariff and revenue acts.

The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him "to establish standards of purity for food products and to classify the same," and that that statute and the regulations issued under it have nothing whatever to do with the revenue system. A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the

meaning of a word used in a revenue statute passed nearly twenty years later. "Guidance of courts of justice" in the act of 1902 means guidance in matters arising under that act and cognate acts only.

The plaintiff's argument based upon legislative history applies only to the act of 1921, but all of the tax involved in this suit and the greater part of that involved in the others was paid under the act. The situation at the time the act of 1921 was passed was as follows: Under the act of 1918, which had used precisely the same word (candy), the Treasury Department had issued the regulations heretofore referred to, including for tax purposes sweet chocolate when sold in certain forms and for certain purposes and excluding it
97 when sold for others. The United States District Court for the District of Massachusetts had construed the word candy in that act as not including sweet chocolate in any form. Candy manufacturers had appeared before committees of Congress and had protested against the exemption from tax of a competing article and urged the specific inclusion of sweet chocolate in the act of 1921. Certain individual members of the Senate had stated in debate that they understood that sweet chocolate was not taxed under the act of 1918.

But all this has very little real value. It is true that, ordinarily, the reenactment of a statute after a clause has received judicial construction is practically conclusive that the legislature has adopted that construction, but a decision of a district court with an appeal therefrom pending and undisposed of cannot be accepted as a basis for the application of this rule. "A question arising in regard to the construction of a statute of the United States concerning patents for inventions cannot be regarded as judicially settled when it has not been so settled by the highest judicial authority which can pass upon the question," Andrews v. Hovey, 124 U. S. 694, 716. This principle is not peculiar to patent cases. There is no more reason to assume that the majority of the members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal. As to the debates in the Senate, the dangers of a resort to such evidence, except as corroborative of conclusions otherwise supported, have been too frequently pointed out to require elaboration. U. S. v. Trans-Missouri Freight Association, 166 U. S. 290, 318; Lapina v. Williams, 232 U. S. 78, 90.

The third branch of the plaintiff's argument directed to establishing a legislative construction of the word candy from its prior acts of Congress is a strong one coming very close to being compelling and the plaintiff is entitled to have it fully considered here.
98 There have been called to the attention of the court thirty-two statutes (mostly tariff acts, but includes several revenue acts), enacted over a period of one hundred and thirty-eight years, all of

which indicate that Congress has consistently drawn a distinction between chocolate or sweet chocolate on the one hand and candy on the other. In these statutes Congress has specifically provided for chocolate, so nomine, some twenty-six times, and in seventeen of them Congress has referred in the same act to chocolate or sweet chocolate in one section and to candy or confectionery in a different one. In no act has sweet chocolate and sweet milk chocolate so nomine been classified with candy. Thus, for example, the tariff act of 1913 referred, in separate provisions, to "sugar candy," "all confectionery not specially provided for in this section" and "unsweetened chocolate and cocoa prepared or manufactured." The tariff act of 1894 provided separately for "sugar candy," "all confectionery made wholly or in part of sugar" and "chocolate, sweetened, flavored, or other * * * and chocolate confectionery." In the combination war revenue and tariff act of March 3, 1883, the classifications are "sugar candy," "all other confectionery" and "chocolate." In the war revenue act of 1866, they are "sugar candy," "all confectionery made wholly or in part of sugar," and "chocolate and cocoa prepared." These references are sufficient to indicate the point involved. Most of these statutes disclose the same general scheme, viz, a provision for candy, then a provision for all confectionery not specially provided for, and then a special provision for chocolate, sometimes referred to as "sweetened," sometimes as "prepared," and sometimes without qualification.

The principle of statutory interpretation contended for by the plaintiff was stated and applied in DeForest v. Lawrence, 13 Howard 274, in which case the Supreme Court said: "* * * For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not * * *." To the same effect is Reiche v. Smythe, 13 Wallace 162, and other cases.

These decisions announce a well established general principle of statutory interpretation, and I do not think that their applicability can be questioned upon the ground that the rule is confined to the interpretation of tariff acts. Nor do I think that it can be successfully argued that prior tariff acts may not be considered in the interpretation of revenue acts. While these two classes of statutes are not strictly in pari materia, nevertheless they are closely related and have frequently been considered together for purposes of interpretation. See Taylor v. Treat, 153 Federal 656; Seeberger v. Castro, 153 U. S. 32; Forbes Lithograph Mfg. Co. v. Worthington, 132 U. S. 655.

Concluding therefore that this branch of the plaintiff's argument is a correct statement of a general canon of statutory interpretation, and that it is properly applicable to the case at hand, we may leave

it for the moment. The principle involved can not be discarded but must be taken into consideration in reaching a final decision, but how far it is to control that result will depend upon further considerations presented by the record which will now be taken up.

It is always to be kept in mind that a statute is not to be read as though open to construction as a matter of course. Where the language is plain and the terms used are free from ambiguity and uncertainty, the court should not look for a meaning beyond the terms of the statute itself. "It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that be plain, and if the law is within the constitutional authority of the lawmaking body which passed it, the sole function of the courts is to enforce it according to its terms." Hamilton v. Rathbone, 175 U. S. 414; Caminetti v. 100 U. S., 242 U. S. 470, 485. A corollary to the general principle just stated is the presumption that words of general popular usage are used in their ordinary sense and with the meaning commonly attributed to them. "The first and most elementary rule of construction is, that it is to be assumed that the words and phrases are used in their technical meaning if they have acquired one and in their popular meaning if they have not * * *." Endlich's Interpretation of Statutes, sec. 2. See De Ganay v. Lederer, 250 U. S. 376.

Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Of course, if the limits of this term were so clearly defined as to be susceptible of precise application to the case in hand, leaving no doubt as to what things are included and what not, the duty of the court would end at this point. But I am not prepared to say that they are so certain as to preclude all resort to further considerations. The very fact that the word is one of popular rather than scientific usage tends to make its precise limits somewhat indefinite, for while the effort of science is toward precise definition, the tendency of popular usage is in the opposite direction. It is to be noted in this connection that the definition of this word as used in various acts of Congress, and of the word confectionery, which is of broader meaning, has been involved in many cases before the federal courts (Arthur v. Stephani, 96 U. S. 125; in re Schilling, 53 Fed. 81; Malley v. Walter Baker & Company, 281 Fed. 41; Funsten v. U. S.; U. S. Court of Claims F-80; U. S. v. McLaughlin, 13 Ct. of Cus. Appeal 404), and varying conclusions have been reached.

101 Curiously enough, both parties insist that the meaning of the term is clear and unambiguous (and, therefore not open to construction), and yet both have advanced a number of arguments based upon matters external to the act itself. However, there is one consideration of great value in matters of interpretation which will not take us outside of the act itself, though it requires us to go beyond the particular word and the clause in which it stands. The scope and purpose of a statute and the object sought to be obtained by the legislature are matters which may be and usually are disclosed by the statute itself, and are often controlling in ascertaining the sense in which words have been used, sometimes even overriding the literal meaning of the words themselves. When we examine the Revenue Acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary. That was the view taken by the Circuit Court of Appeals for the first Circuit in Malley v. Walter Baker & Company, 281 Fed. 41 (a case which will be later referred to), and was the controlling factor in that decision. In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation.

The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained, nor does the decision upon which the plaintiff relies (Arthur v. Stephani, 96 U. S. 125) compel its adoption. In that case the court had before it an act which imposed a duty upon chocolate, eo nomine, and the question was whether it was dutiable under that act or a prior act which imposed one duty upon confectionery and another upon chocolate. There was evidence before the court showing that the chocolate, which was the subject of the suit was such as is
102 ordinarily sold by confectioners as confectionery. It was conceded that the word chocolate used in the later act exactly described the plaintiff's product. What was decided was that where there is a word in a statute which precisely describes an article, the fact that that article may be or generally is used in a way which would also bring it under another and broader class also provided for in that or a previous statute will not take it out of the former and place it in the latter for purposes of taxation. But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold.

It was so held in Malley v. Walter Baker & Company, supra, and the court there pointed out that unless these matters could be taken as a basis for classification it would be difficult to see how candy could be taxed at all, because many, in fact a greater number of, varieties of candy are simply sugar with a little flavoring or coloring matter. The court said, "When somewhat less than half of a tooth-some sweet is chocolate—also a common ingredient of candy compounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy."

I have given no weight to the Treasury regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction. 103.

To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921.

Were this a case of first impression I feel confident that I should have arrived at the result indicated. But in Malley *v.* Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the Act of 1918 decided that sweet chocolate was properly taxable as candy. I have examined the briefs in that case and, while the opinion does not indicate it, it is a fact that the court had before it the same argument which the plaintiff here has made based upon prior tariff and revenue acts, which I have indicated is his strongest point. While not absolutely controlling, the rule of comity requires me to follow that decision unless it appears beyond doubt to have been erroneous.

In view of what has been said the decision is reached that the collection of the tax was lawful.

Judgment may be entered for the defendant.

By the court:

W. H. KIRKPATRICK, *J.*

Simultaneously with the filing of the foregoing opinion and findings and conclusions the said court filed special findings and conclusions on the requests for findings of fact and conclusions of law as follows, viz:

104 *Findings of fact*

The court finds the facts as contained in plaintiff's requests for findings of fact, Numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact and are incorporated here by reference. All requests for findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to.

Conclusions of law

1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word "candy" in the revenue acts of 1918 and 1921.

2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant.

3. The defendant is entitled to judgment.

The plaintiff's requests for conclusions of law are all denied.

By the court:

W. H. KIRKPATRICK, *J.*

105 Upon motion of counsel for plaintiff the court thereafter ordered a reargument of the questions involved, which was had on December 4, 1928, and thereafter on January 17, 1929, the court filed the following opinion modifying and re-affirming the findings and conclusions heretofore made, viz:

Opinion sur reargument

Filed January 17, 1929

HERSHEY CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the First District of Pennsylvania.

At the request of the plaintiffs the court granted a reargument in the sixteen cases of which the above-entitled case was one.

I

The plaintiffs called the attention of the court to certain minor inaccuracies of statement in the opinion. These will be corrected. On page 4 the court in referring to the decision of the District Court of Massachusetts in Malley v. Walter Baker & Company stated that, at the time the Act of 1921 was passed, this decision had been

appealed from and the case was pending in the Circuit Court of Appeals. The fact is that final judgment in the case in the District Court was not entered until December 4, 1921. The opinion will be corrected in this respect and the word "pending" in line 8 on page 5 will be stricken out. These changes have no effect on either the conclusion reached or the reasoning involved. On page 10 the court stated that the word "candy" was concededly not an eo nomine description. The plaintiff objects to this statement and it will be eliminated.

106 The court is of the opinion that there are no other inaccuracies of statement requiring correction.

The opinion as filed will be withdrawn and an opinion changed in the above particulars only will be filed.

II

The plaintiffs object to the following portion of the court's findings of fact, which is the same in all cases.

"In addition thereto, the statements of facts contained in the opinion of the court filed in the case of Blakely D. McCaughn, Number 12360, June term, 1926, are adopted as additional findings of fact, other than those first above referred to, are denied, except in so far as the facts are stated in the opinion referred to."

The objections are: First, that the above manner of finding facts is not proper practice, and second, that the finding is incorrect in this case because some of the facts stated in the opinion are not supported in the record of all of the cases but only in some of them.

As to the first objection I have found nothing in the practice of the United States courts in trials at law without juries which requires specific answers of affirmance or refusal to each separate request for findings presented by a party. The adoption of such practice (which exists in the Pennsylvania courts both in equity and in trial at law without a jury) would be an added and heavy burden upon the trial judge and I am unable to see any compensating advantage, either in simplicity of method or in accuracy in arriving at a proper conclusion. The fact of the matter is that it usually merely produces unnecessary complications and leads to quibbling over details and matters of precise expression, which are frequently unimportant. If the judge believes that a request contains a statement of fact which is partially correct or which, while substantially correct, is stated in such a manner as to produce uncertainty as to the exact scope or meaning of the finding, he is entirely within the limits of proper practice in stating the

107 fact as it should be stated. If he makes such statement of fact in the course of the opinion and then specifically and as a separate finding finds the fact to be as there stated, it seems perfectly unnecessary to duplicate and encumber the record by restating as a part of his findings of fact, word for word, what he has already stated in the opinion.

As to the second objection of the plaintiffs to the Court's findings of fact, it is true that some of the statements made do not apply to all of the plaintiffs. Thus the names given to the product by the various plaintiffs obviously must be referred to the particular cases. It is also true that, as to the plaintiffs Klein and York, there was no evidence referring to labels or packing, and, as to Wilbur and York, there is no evidence as to what kind of stores sell their product. The whole objection is without merit, however, because the result arrived at would be exactly the same even if we eliminate, as to certain defendants, the findings objected to as not applicable to them.

III

The plaintiff has called to the attention of the court the decision of the Supreme Court of the United States in Boston Sand & Gravel Company v. United States handed down November 19, 1928, or one day before the opinion in this case was filed, and of course not known to this court at that time, with special reference to the statement there made that the rule that, when the meaning of language is plain, courts are not to resort to evidence in order to raise doubts "is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists." The court went on to say: "If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice it would be arbitrary to refuse to consider that fact when we come to interpret a statute."

I do not think that it was either the intention or the effect
108 of the opinion in that case to abrogate the well-established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all. The act there under consideration was a special act allowing a suit in admiralty to be brought in the District Court of the United States to recover for a collision, and the question was whether the words "legal damages" which the act authorized the court to find included interest. The phrase involved was certainly not a phrase of popular usage. The ordinary layman's understanding of the words "legal damages" (as to whether this included interest or not), if such person would have any understanding at all, would be perfectly useless in solving the problem. The phrase was a technical one involving legal terms and legal procedure and, in its interpretation, the sense in which it had been used in prior or parallel acts of Congress assumed peculiar importance. In giving a definition to the word "candy," however, we have just the opposite situation. Here the most important consideration is the

popular meaning of the term. It may be noted that in a recent decision of the Supreme Court (George Van Camp & Sons Co. v. American Can. Co. #94, October term, 1928) the general rule referred to is re-affirmed. The court said: "Decisions of this Court, where the letter of the statute was not deemed controlling and the legislative intent was determined by a consideration of circumstances apart from the plain language used, are of rare occurrence and exceptional character, and deal with provisions which, literally applied, offend the moral sense, involve injustice, oppression or absurdity, United States v. Goldenberg, 168 U. S. 95, 103, or lead to an unreasonable result, plainly at variance with the policy of the statute as a whole."

It is to be noted that this court in the cases now before it did not refuse to consider the apparently limited uses of the word in
109 other acts of Congress. That matter was considered fully and the question was whether it should outweigh what appeared to be the plain popular meaning of the word and the patent general intent of the statute. The conclusion reached was that the latter considerations were the more important and controlling ones. The conclusions reached in the opinion filed will not be changed.

By the court:

W. H. KIRKPATRICK, *J.*

And thereupon counsel for the said plaintiff did then and there except as set forth in the notes of the trial before the said court without a jury, and did then and there except to the findings of fact and conclusions of law made by the said court as follows, viz:

Plaintiff's Exceptions

A. EXCEPTIONS TO THE FINDINGS IN THE OPINIONS OF THE COURT

1. The plaintiff excepts to the following finding in the revised opinion of the court:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The plaintiff excepts to the following finding in the revised opinion of the court:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with
110 establishing standards of purity has no bearing whatever upon the meaning of a word used in a revenue statute passed nearly twenty years later. 'Guidance of courts of justice' in the act of

1902 means guidance in matters arising under that act and cognate acts only."

3. The plaintiff excepts to the following finding in the revised opinion of the court:

"There is no more reason to assume that the majority of the members of Congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The plaintiff excepts to the following finding in the revised opinion of the court:

"Certainly the word candy has never acquired a technical or scientific definition, and in fact there are few words in the language less likely to be scientifically defined."

5. The plaintiff excepts to the following finding in the revised opinion of the court:

"It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The plaintiff excepts to the following finding in the revised opinion of the court:

"When we examine the revenue acts of 1918 and 1921, it
111 becomes perfectly obvious that the primary purpose of the excise features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The plaintiff excepts to the following finding in the revised opinion of the court:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The plaintiff excepts to the following finding in the revised opinion of the court:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The plaintiff excepts to the following finding in the revised opinion of the court:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider

the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold."

10. The plaintiff excepts to the following finding in the revised opinion of the court:

"To sum up the whole problem, we have here on the one
112 hand a pretty well defined popular usage of the term candy which includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The plaintiff excepts to the following finding in the revised opinion of the court:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit passing upon the same question under the act of 1918 decided that sweet chocolate was properly taxable as candy."

12. The plaintiff excepts to the following finding in the revised opinion of the court:

"In view of what has been said the decision is reached that the collection of the tax was lawful."

13. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States, No. 15, Oct. T., 1928, U. S. Supreme Court), to abrogate the well-established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature
113 intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

14. The plaintiff excepts to the following finding in the opinion of the court filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15, Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

B. EXCEPTIONS TO THE DENIAL OF PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT

1. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

2. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

3. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding
114 cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished products."

4. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

5. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

6. The plaintiff excepts to the denial by the court of the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

C. EXCEPTIONS TO THE DENIAL OF THE PLAINTIFF'S REQUESTS FOR CONCLUSIONS OF LAW

1. The plaintiff excepts to the refusal of the court to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

115 2. The plaintiff excepts to the refusal of the court to affirm the plaintiff's second request for conclusion of law:

"2. The revenue act of 1921, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

which was denied by the court.

3. The plaintiff excepts to the refusal of the court to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921."

which was denied by the court.

4. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

which was denied by the court.

5. The plaintiff excepts to the refusal of the court to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest."

which was denied by the court.

D. EXCEPTIONS TO THE COURT'S CONCLUSION OF LAW

1. The plaintiff excepts to the court's conclusion of law as follows:

116 "1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this action were paid, are candy within the meaning of the word 'candy' in the Revenue Acts of 1918 and 1921."

2. The plaintiff excepts to the court's conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

3. The plaintiff excepts to the court's conclusion of law as follows:

"3. The defendant is entitled to judgment."

And inasmuch as the said testimony, opinions, findings, and conclusions, so excepted to, do not fully appear upon the record, the said counsel for the plaintiff did then and there tender this bill of exceptions as aforesaid and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the plaintiff did put his seal to this bill of exceptions pursuant to the aforesaid statute in such case made and provided this 26 day of January, 1929.

W. H. KIRKPATRICK, J. [L.S.]

PHILADELPHIA, PA., *January 26, 1929.*

I hereby approve the above bill of exceptions as to form and agree that the same may be settled by the court, and I hereby accept service of notice of settlement thereof in accordance with the ruling of the court.

GEORGE W. COLES,
United States Attorney, for Defendant.

117 In United States District Court

Præcipe to Enter Judgment

Filed April 22, 1929

[Title omitted.]

To the Clerk, U. S. D. C., E. D. of Pa.

Enter judgment in the above entitled case in favor of the defendant and against the plaintiff in accordance with the revised opinion of the court filed Jan. 22, 1929.

GEORGE W. COLES,
United States Attorney.

118 In United States District Court

YORK CHOCOLATE COMPANY

v.

BLAKELY D. MCCAUGHN, COLLECTOR OF INTERNAL REVENUE

Judgment

Filed April 22, 1929

Before KIRKPATRICK, *J.*

And now, April 22nd, 1929, in accordance with the revised opinion of the court, filed January 22nd, 1929, and by præcipe filed, judgment in the above entitled case is hereby entered in favor of the defendant, and against the plaintiff, York Chocolate Company.

By the court.

Attest:

E. G. JOHNSON,
Deputy Clerk.

119 In United States District Court

[Title omitted.]

Assignments of error

Filed May 17, 1929

Comes now the above-named plaintiff, the appellant herein, by its attorneys of record, and assigns as errors upon which it will

rely, the following errors as having intervened in the record, proceedings and judgment of the United States District Court for the Eastern District of Pennsylvania in the above entitled cause, to wit:

1. The learned court below erred in the following finding in the revised opinion:

"The first branch of the plaintiff's argument may be briefly dismissed, merely pointing out that the statute under which the Secretary of Agriculture was authorized to issue the regulations in question authorized him to establish standards of purity for food products and to classify the same, and that that statute and the regulations issued under it have nothing whatever to do with the revenue system."

2. The learned court below erred in the following finding in the revised opinion:

"A departmental regulation classifying certain articles under a statute authorizing such classification in connection with establishing standards of purity has no bearing whatever upon the meaning of a word used in a Revenue Statute passed nearly twenty years
120 later. 'Guidance of courts of justice' in the act of 1902 means guidance in matters arising under that act and cognate acts only."

3. The learned court below erred in the following finding in the revised opinion:

"There is no more reason to assume that the majority of the members of congress in voting for the act of 1921 regarded the decision of the district court as settling the interpretation of the act than there is to assume that the majority disagreed with that view and confidently expected that it would be reversed on appeal."

4. The learned court below erred in the following finding in the revised opinion:

"Certainly the word candy has never acquired a technical or scientific definition and in fact there are few words in the language less likely to be scientifically defined."

5. The learned court below erred in the following finding in the revised opinion:

"It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

6. The learned court below erred in the following finding in the revised opinion:

"When we examine the revenue acts of 1918 and 1921, it becomes perfectly obvious that the primary purpose of the excise
121 features of those acts was to tax luxuries as distinguished from necessaries. A mere reading of the act shows this, and discussion is unnecessary."

7. The learned court below erred in the following finding in the revised opinion:

"In the form in which plaintiff's products have been here taxed they clearly come under the general category of luxuries, and as such are within the general scheme of the legislation."

8. The learned court below erred in the following finding in the revised opinion:

"The plaintiff says that the form in which the product is sold or the use to which it is put may not be considered in determining whether or not it comes within the meaning of the term used in the statute. I do not think that this contention can be sustained."

9. The learned court below erred in the following finding in the revised opinion:

"But the subject of this inquiry is a general term and we are particularly concerned with whether the article in question comes within the general scope and purpose of the act and therefore within the meaning of the term in question construed with reference to that scope and purpose. For this purpose, it is proper to consider the form of the article, the use to which it is put and the manner and places in which it is ordinarily sold."

10. The learned court below erred in the following finding in the revised opinion:

"To sum up the whole problem, we have here on the one hand a pretty well defined popular usage of the term candy which
122 includes the articles taxed, together with a clearly evidenced purpose in the statute itself which makes the inclusion of the articles logical and in accord with the general scheme of the legislation. As opposed to these there is cited a rule of interpretation based upon matters extrinsic to the act itself and consequently of a more or less artificial nature. As between these considerations, if they lead in opposite direction, the former will be adopted rather than the latter. The conclusion follows that the products on which the excise taxes involved in these actions were paid are candy within the meaning of the word candy of the revenue acts of 1918 and 1921."

11. The learned court below erred in the following finding in the revised opinion:

"But in Malley v. Walter Baker & Company, supra, the Circuit Court of Appeals for the 1st Circuit, passing upon the same question under the act of 1918, decided that sweet chocolate was properly taxable as candy."

12. The learned court below erred in the following finding in the revised opinion:

"In view of what has been said the decision is reached that the collection of the tax was lawful.

13. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"I do not think that it was either the intention or the effect of the opinion in that case (Boston Sand & Gravel Co. v. United States,

No. 15, Oct. T., 1928, U. S. Supreme Court), to abrogate the well-established rule that where a word is not a technical word but one of general popular usage with nothing to show that it is not used in its ordinary sense, its general popular meaning will be the most important consideration in determining what the legislature intended the word to signify. In fact, I do not think that the case cited touches that rule at all."

123 14. The learned court below erred in the following finding in the opinion filed January 17, 1929, viz:

"The phrase ('legal damages,' involved in the case of Boston Sand & Gravel Co. vs. United States, No. 15, Oct. T., 1928, U. S. Supreme Court) was a technical one involving legal terms and legal procedure, and in its interpretation, the sense in which it had been used in prior or parallel acts of Congress, assumed peculiar importance. In giving a definition to the word 'candy' we have just the opposite situation. Here the most important consideration is the popular meaning of the term."

15. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate, on February 24, 1919, and for a long time prior thereto and since, until the present time, were products which had an identity well known to dealers in and consumer of food products, and to the Congress of the United States."

16. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy, on February 24, 1919, and for a long time prior thereto and since, until the present time, was a product which had an identity well known to dealers in and consumers of food products, and to the Congress of the United States."

17. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Chocolate is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. Sweet chocolate is chocolate mixed with sugar (sucrose), with

124 or without the addition of cocoa butter, spices, or other flavoring materials. Sweet milk chocolate is sweet chocolate which contains not less than twelve per cent (12%) of whole milk solids in the finished product."

18. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Candy is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filing materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug."

19. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Since the act of May 2, 1792, 1 Stat. L. 259, 2nd Congress, session 1, chapter 27, Congress has classified chocolate for revenue purposes as an article distinct and separate from candy."

20. The learned court below erred in denying the plaintiff's request for finding of fact as requested, viz:

"Sweet chocolate and sweet milk chocolate are not candy."

22. The learned court below erred in refusing to affirm the plaintiff's first request for conclusion of law:

"1. The revenue act of 1918, did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

22. The learned court below erred in refusing to affirm the plaintiff's second request for conclusion of law:

125 "2. The revenue act of 1921 did not levy a tax upon sales of sweet chocolate or sweet milk chocolate, eo nomine."

23. The learned court below erred in refusing to affirm the plaintiff's third request for conclusion of law:

"3. Sweet chocolate and sweet milk chocolate are not candy within the meaning of the word candy in the revenue acts of 1918 and 1921."

24. The learned court below erred in refusing to affirm the plaintiff's fourth request for conclusion of law:

"4. The taxes levied upon and paid by the plaintiff, for the recovery of which this suit has been brought, were unlawfully assessed and collected by the defendant."

25. The learned court below erred in refusing to affirm the plaintiff's fifth request for conclusion of law:

"5. The plaintiff is entitled to judgment for the amount set forth in the statement of claim with interest."

26. The learned court below erred in its conclusion of law as follows:

"1. The sweet chocolate and sweet milk chocolate manufactured by the plaintiff and on which the excise taxes involved in this section were paid, are candy within the meaning of the ward 'candy' in the revenue acts of 1918 and 1921."

27. The learned court below erred in its conclusion of law as follows:

"2. The taxes levied upon and paid by the plaintiff for the recovery of which this suit was brought, were lawfully assessed and collected by the defendant."

126 28. The learned court below erred in its conclusion of law as follows:

"3. The defendant is entitled to judgment."

29. The learned court below erred in entering judgment against the plaintiff and in favor of the defendant.

Wherefore appellant prays that the judgment entered in said cause in the said District Court for the Eastern District of Pennsylvania may be reversed and the said cause remanded.

L. F. MAGEE,
WM. CLARKE MASON,
Attorneys for Plaintiff.

127 In United States District Court

[Title omitted.]

Petition for appeal

Filed May 17, 1929

To the Honorable W. H. KIRKPATRICK, *District Judge:*

The above named plaintiff, York Chocolate Company, feeling aggrieved by the judgment rendered and entered in the above-entitled cause on the 22nd day of April, 1929, does hereby appeal from said judgment to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignments of error filed herewith, and prays that the appeal be allowed and that citation be issued as provided by law, and that a transcript of the records, proceedings and documents upon which said judgment was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit under the rules of such court in such case made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it to perfect its appeal, be made.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

YORK CHOCOLATE COMPANY,
By D. F. MAGEE,
WM. CLARKE MASON,
Attorneys for Plaintiff.

128 In United States District Court

YORK CHOCOLATE COMPANY, PLAINTIFF

vs.

BLAKELY D. MCCAUGHN, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA, DEFENDANT

Order allowing appeal

Filed May 17, 1929

Before KIRKPATRICK, *J.*

Upon the petition of the plaintiff herein and plaintiff's assignments of error, it is hereby ordered that an appeal to the United

States Circuit Court of Appeals for the Third Circuit from the judgment heretofore filed and entered in this cause on the 22nd day of April, 1929, be and the same is hereby allowed, and that a certified transcript of the record in accordance with the rules of practice of the courts of the United States be transferred to the said United States Circuit Court of Appeals for the Third Circuit.

It is further ordered that the bond on appeal be fixed in the sum of $250, the same to act as a bond for costs on appeal.

Dated at Philadelphia, Pennsylvania, May 17, 1929.

By the court.

Attest:

GEORGE BRODBECK, *Clerk.*

129 In United States District Court

Præcipe for Transcript of Record

Filed May 17, 1929

[Title omitted.]

To the Clerk of the said Court:

You are hereby requested to make a transcript of the record to be filed in the Circuit Court of Appeals for the Third Circuit pursuant to an appeal filed in the above entitled case and to include in such transcript the following:

Docket entries;
Statement of claim;
Affidavit of defense;
Stipulation to try case before court without jury;
Opinion, Kirkpatrick, *J.*, filed November 22, 1928;
Findings of fact and conclusions of law;
Opinion, Kirkpatrick, *J.*, filed January 17, 1929;
Revised opinion, Kirkpatrick, *J.*, filed January 22, 1929;
Bill of exceptions;
Præcipe for judgment;
Judgment;
Petition for appeal, and assignments of error;
Order allowing appeal;
Præcipe for transcript of record;
Physical exhibits;
Clerk's certificate.

D. F. MAGEE,
WM. CLARKE MASON,
Attorneys for Plaintiff.

130 [Clerk's certificate to foregoing transcript omitted in printing.]

131 In the United States Circuit Court of Appeals for the Third Circuit

No. 4172. October term, 1929

YORK CHOCOLATE CO., APPELLANT

v.

BLAKELY D. MCCAUGHN, COLLECTOR, APPELLEE

No. 4170

YORK CHOCOLATE CO., APPELLANT

v.

EST. F. B. DAVIS, COLLECTOR, APPELLEE

No. 4171

YORK CHOCOLATE CO., APPELLANT

v.

EST. E. LEDERER, COLLECTOR, APPELLEE

Order assigning judge

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to wit, this 15th day of November, A. D., 1929, it is ordered that Hon. John Boyd Avis, District Judge for the —— District of New Jersey, be, and he is hereby assigned to sit in above case in order to make a full court.

(Sgd.) JOSEPH BUFFINGTON,
Circuit Judge.

132 [Minute entry of argument and submission Nov. 15, 1929. Omitted in printing.]

133 In United States Circuit Court of Appeals for the Third Circuit

HERSHEY CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4157, October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4158, October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4159 October term, 1929

HERSHEY CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4160, October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4161, October term, 1929
HERSHEY CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4162, October term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4163, October term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4164, October term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4165, October term, 1929
KLEIN CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4166, October term, 1929
WILBUR-SUCHARD CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4167, October term, 1929
WILBUR-SUCHARD CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4168, October term, 1929
WILBUR-SUCHARD CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4169, October term, 1929
YORK CHOCOLATE CO., APPELLANT v. EST. B. F. DAVIS, COLLECTOR, APPELLEE	No. 4170, October term, 1929
YORK CHOCOLATE CO., APPELLANT v. EST. E. LEDERER, COLLECTOR, APPELLEE	No. 4171, October term, 1929
YORK CHOCOLATE CO., APPELLANT v. B. D. MCCAUGHN, COLLECTOR, APPELLEE	No. 4172, October term, 1929

Appeals From the District Court of the United States for the Eastern District of Pennsylvania

Opinion

Filed June 6, 1930

Before WOOLLEY and DAVIS, *Circuit Judges*, and AVIS, *District Judge*

AVIS, *District Judge:*

These cases were all tried in the District Court at one time; one opinion was rendered in all of the cases, and although brought into this court by separate appeals, were heard in one argument.

Appellants are all manufacturers of sweet chocolate and sweet milk chocolate, the product of the cacao bean, and made certain payments of amounts alleged to be due the Government as taxes, under the revenue acts of 1918 and 1921 and the regulations of the Internal Revenue Commissioner. All of said payments were made "under protest," and later, at different and sundry times, appellants filed claims for refund with the collectors of internal revenue, in the various districts in which payments had been made, for transmission to the Commissioner of Internal Revenue. All of said claims for refund were rejected by the commissioner, and the suits followed.

The district court, sitting without a jury, heard the testimony, held that the tax was lawfully imposed, and caused judgment to be entered in favor of the defendants, and from these judgments, all of the cases are brought by appeal to this court.

Twenty-nine assignments of error were filed, and relied upon by the appellants, but as a matter of fact they are all merged in one question to be decided, i. e., Does the word "candy" in the revenue act of 1918 (Title IX, sec. 900 (9)) and the revenue act of 1921 (Title IX, sec. 900 (6)), include sweet chocolate and/or sweet milk chocolate?

The portion of the act of 1918 under which the tax was assessed and paid, reads as follows:

"That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or released—

"(9) Candy, 5 per centum; . . ." (40 Stat., c. 18, pp. 1057, 1122).

The act of 1921 reads exactly the same, with the exception that the percentage of tax is placed at 3 per cent instead of 5.

The decision of this question rests upon—

(1) The definition of the word "candy."

(2) Whether or not sweet chocolate and sweet milk chocolate is candy in accordance with its commonly accepted use?

(3) Did Congress intend to include sweet chocolate and sweet milk chocolate under the term "candy" in the revenue acts?

(4) Was the regulation of the Commissioner of Internal Revenue conclusive, and did he have authority, under the acts, to include sweet chocolate and sweet milk chocolate under the term "candy"?

(5) Do the classifications promulgated by the Secretary of Agriculture, under the pure food laws, in any way affect the question of the legality of the tax imposed?

Under the evidence in this case, it is rather difficult to define the word "candy." There is nothing in the testimony, outside of the technical definitions, and possibly the classifications promulgated by the Secretary of Agriculture, to assist the court in arriving at a conclusion as to the inclusiveness of the word. Webster defines candy as follows:

"A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruit, nuts, etc. Also, any sweetmeat made of, or coated with, a preparation of sugar or molasses; a piece of confectionery."

The evolution of the use of sweetmeats in modern times may have, and probably has, extended the meaning of the word to other articles than those strictly included in the definition given by Webster.

Counsel for appellants argue that the classification by the Secretary of Agriculture, under the pure food laws and under authority given by Congress, indicates that sweet chocolate and sweet milk chocolate are not included within the designation of "candy."

It is true that in this classification, candy and chocolate, both "sweet" and "sweet milk," are under separate heads, and it is apparent that for purposes of the statute under which this classification was made, it was undoubtedly treated under separate headings, but this may not be conclusive in construing the revenue acts under which this suit was brought. Whether or not "candy" in its technical sense includes sweet chocolate and/or sweet milk chocolate, we do not deem it necessary to decide, in view of our conclusions, hereinafter set forth, with relation to the intention of Congress when the revenue acts of 1918 and 1921 were enacted.

The court below said, with relation to the word "candy" as it applies to sweet chocolate and sweet milk chocolate:

"It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's products is not a natural one."

This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact.

It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion. While some people might look upon it as candy, we feel that many would call it a food, and in the absence of anything in the record tending to show that this is the popular opinion, we can not sustain the judgment of the court on this theory.

We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.

In all of the tariff internal revenue acts of Congress from 1792 to 1913, candy generally called "sugar candy," and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate and when it was asserted that chocolate was a concentrated food used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the Members of Congress.

The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in congressional enactments or by executive regulation, included in the term "candy" is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate eo nomine, notwithstanding the fact that the regulations of the Commissioner, classifying both as "candy," under the 1918 act, and that the District Court decision in Massachusetts holding they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of De Forest et al., v. Lawrence, 54 U. S. 278, 281, said:

"And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be

designed, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the customhouse.

"It is but fair to presume, after having been treated by the lawmakers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different."

In Reiche v. Smythe, 80 U. S. 162, 165, it was held:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in pari materia, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."

The effect of the distinction recognized by Congress is very aptly referred to in the case of Arthur v. Stephani, 96 U. S. 125, 127, 128, wherein the court, among other things, said:

"Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name.

. . . . . .

"Contemporaneously and side by side, all the way down, the statutes provide for different rates of duty on the varieties of sugar and on confectionery, as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties.

. . . . . .

"It is quite evident that Congress has at all times intended to preserve the distinction between these articles, and that the circuit judge decided correctly when he held that chocolate, although in the form and of the character described, was not dutiable as 'confectionery' under the act of 1864."

This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case sub judice.

This is further demonstrated by an examination of the record of deliberations and discussions in the committees; and also upon the floor of the Senate, when the 1921 act was under consideration, which are corroborative of the facts upon which our conclusions are based.

An examination of the evidence offered in this regard discloses that a Mr. Fuller, apparently a candy manufacturer, called the attention of the Senate committee to a decision in the United States Court, District of Massachusetts, holding that chocolate was not candy, and not taxable under the 1918 act; and that some provision should be made in the 1921 act to put chocolate upon the same basis as candy, either by removing the tax from candy, or, inferentially, to impose a similar tax on chocolate. Similar representations were made to the House Ways and Means Committee; and the question was discussed quite fully on the floor of the Senate; the understanding, apparently at that time, being that the word "candy," in the revenue act of 1918, did not include sweet chocolate or sweet milk chocolate.

In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the committee a definition of the word "candy," which included sweet chocolate and sweet milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases.

The deliberations of the committees and the facts produced before them when considering the bill, appear to be legal evidence and should be given its due weight. Holy Trinity Church v. United States, 143 U. S. 457, 464; Binns v. United States, 194 U. S. 486, 495.

In spite of the knowledge of the Representatives and Senators in Congress, no definite tax was levied on sweet chocolate or sweet milk chocolate; and from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the revenue acts of 1918 or 1921.

In both the revenue acts of 1918 and 1921, the authority of the commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:

"That the commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

It will be noted in this statute that it provides for "rules and regulations" which shall be "for the enforcement of the provisions of this act."

The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly, the commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

In the case of Morrill v. Jones, 106 U. S. 466, 467 Chief Justice Waite said:

"The Secretary of the Treasury can not by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

See, also, United States v. United Verde Copper Co., 196 U. S. 207.

A regulation of an executive department construing a statute is given great weight, and is strongly persuasive, and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. See Burk-Waggoner Oil Assn. v. Hopkins (N. D. Tex.), 296 F. 492, and cases cited.

Taking into consideration, the reading of the statute; the prior attitude of Congress with relation to imposition of taxes on chocolate; and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining "candy," afterward promulgated by the commissioner and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant-appellee.

We, therefore, hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the commissioner, approved by the Secretary.

It is contended by the appellants that the classifications of the Secretary of Agriculture, promulgated under the pure food laws, conclusively define chocolate as a product which could not be included under the term "candy," which is also classified in these regulations. These classifications were made under laws relating to pure foods, and, while they might have some effect upon the establishment of the general definition of the respective products, we can not see that they are in any way controlling on the main questions at issue in these cases.

The case of Malley v. Walter Baker & Co. (C. C. A. 1), 281 F. 41, is strongly relied upon by the appellee, it being the contention that this case is controlling as establishing a precedent which in effect

should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley case there was no decision upon the question of what Congress intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress, or the proceedings of the committees of Congress in consideration of the bills, was submitted to the court considering that case. We are not able to follow that court in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word "candy," or in its conclusion that the commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress.

The judgments of the District Court are reversed and the cases remanded for new trials or other lawful proceedings in conformity with this opinion.

A true copy:
Teste:

Clerk of the United States Circuit Court of Appeals for the Third Circuit.

134 In United States Circuit Court of Appeals For the Third Circuit

No. 4172. October term, 1929

YORK CHOCOLATE CO., APPELLANT

v.

BLAKELY D. MCCAUGHN, COLLECTOR, APPELLEE

In Error to the District Court of the United States, for the Eastern District of Pennsylvania

Judgment

June 6, 1930

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and the same is hereby, reversed, and the case remanded to the said District Court for further proceedings in conformity with the opinion of this court.

Philadelphia, June 6, 1930.

/sgd/ VICTOR B. WOOLLEY,
Circuit Judge.

Similar orders entered June 6, 1930 in the following cases:

York Chocolate Co., appellant, v. Est. F. B. Davis, Collector, appellee, No. 4170.

York Chocolate Co., appellant, v. Est. E. Lederer, Collector, appellee, No. 4171.

135 [Clerk's certificate to foregoing transcript omitted in printing.]

United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4170

YORK CHOCOLATE COMPANY, APPELLANT

vs.

M. LOUISA DAVIS, EXECUTRIX OF B. F. DAVIS, DECEASED, FORMERLY United States Collector of Internal Revenue for the Ninth District of Pennsylvania, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of York Chocolate Company, Appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4172, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of York Chocolate Company, Appellant, vs. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, Appellee, U. S. C. C. A., Third Circuit, October term, 1929, No. 4172.

Dated June 17, 1929.

D. F. MAGEE,
D. F. MAGEE,

WM. CLARKE MASON,
WM. CLARKE MASON,
Attorneys for Appellant.

GEORGE W. COLES,
GEORGE W. COLES,
Attorneys for Appellee.

Approved: June 20, 1929.

Buffington. Per curiam.

Endorsement: 4170, stipulation of counsel. Received and filed Jul. 5, 1929. William P. Rowland, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, sct.

I, William P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of York Chocolate Company, Appellant, vs. M. Louisa Davis, Executrix of B. F. Davis, deceased, formerly United States Collector of Internal Revenue for the Ninth District of Pennsylvania, Appellee, No. 4170, October term, 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 5th day of September in the year of our Lord one thousand nine hundred and thirty and of the independence of the United States the one hundred and fifty-fifth.

[SEAL.] WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

United States Circuit Court of Appeals for the Third Circuit

October term, 1929

No. 4171

YORK CHOCOLATE COMPANY, APPELLANT

vs.

GRACE N. LEDERER, EXECUTRIX OF EPHRAIM LEDERER, FORMERLY United States Collector of Internal Revenue for the First District of Pennsylvania, appellee

Stipulation

It is hereby stipulated and agreed by and between the parties in the above case, by their respective counsel, that the decision of this case shall be controlled by and conform to the ultimate decision in the case of York Chocolate Company, Appellant, v. Blakely D. McCaughn, United States Collector of Internal Revenue for the First District of Pennsylvania, Appellee, United States Circuit Court of Appeals for the Third Circuit, as of October term, 1929, No. 4172, and that judgment appropriate to the amount involved in this case shall be entered in this case to the same effect and for the party plaintiff or defendant as the judgment which will be entered ultimately in the said case of York Chocolate Company, Appellant, vs. Blakely D. McCaughn, United States Collector of

Internal Revenue for the First District of Pennsylvania, Appellee, U. S. C. C. A. Third Circuit, October term 1929, No. 4172.
Dated June 17, 1929.

D. F. MAGEE,
*** D. F. MAGEE,
WM. CLARKE MARSON,
WM. CLARKE MASON,
Attorneys for Appellant.
GEORGE W. COLES,
Attorney for Appellee.

Approved: June 20, 1929.
Buffington,
C. J. Per curiam.

Endorsements: No. 4171, stipulation of counsel. Received & filed Jul. 5, 1929. William P. Rowland, clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, Third Judicial Circuit, ss.

I, William P. Rowland, clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original stipulation of counsel filed on July 5, 1929, in the case of York Chocolate Company, Appellant, v. Grace N. Lederer, Executrix of Ephraim Lederer, formerly United States Collector of Internal Revenue for the First District of Pennsylvania, Appellee, No. 4171, October term, 1929, on file, and now remaining among the records of the said court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this 5th day of September, in the year of our Lord one thousand nine hundred and thirty, and of the Independence of the United States the one hundred and fifty-fifth.

WM. P. ROWLAND,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1930

Supreme Court of the United States

October term, 1930

No. 441

B. D. McCAUGHN, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

October term, 1930

No. 439

EST. B. F. DAVIS, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

October term, 1930

No. 440

EST. E. LEDERER, COLLECTOR, PETITIONER

vs.

YORK CHOCOLATE CO.

Order allowing certiorari

Filed October 20, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Nos. 426 to 441 inc.

In the Supreme Court of the United States

OCTOBER TERM, 1930

B. D. McCAUGHN, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* WILBUR-SUCHARD CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* WILBUR-SUCHARD CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, *v.* WILBUR-SUCHARD CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, *v.* YORK CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, *v.* YORK CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, *v.* YORK CHOCOLATE CO.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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October Term, 1930

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B. D. McCaughn, Collector, *v.* York Chocolate Co.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the petitioners, prays that writs of certiorari issue to review the judgments of the Circuit Court of Appeals for the Third Circuit entered in the sixteen cases on June 6, 1930, between the above-named parties, which cases were docketed as Nos. 4157, 4158, 4159, 4160, 4161, 4162, 4163, 4164, 4165, 4166, 4167, 4168, 4169, 4170, 4171, and 4172, October Term, 1929, in said court and which judgments reversed the judgments of the District Court of the United States for the Eastern District of Pennsylvania.

STATEMENT

Respondents brought suits in the United States District Court for the Eastern District of Pennsylvania to recover amounts paid as excise taxes on "candy" under the provisions of Title IX, Section 900 (9), of the Revenue Act of 1918, and Title IX, Section 900 (6) of the Revenue Act of 1921, on the sale by respondents of sweet chocolate and sweet milk chocolate in various forms and sizes. The taxes were paid monthly over a period of years. Since different individuals held the office of Collector of Internal Revenue during the period involved, sixteen separate suits were filed by respondents. Written stipulations waiving a jury were

filed. (R. 3–16. All references are to the record in the case docketed in the Circuit Court of Appeals as No. 4157, *Hershey Chocolate Company* v. *McCaughn*.)

The District Court made special findings of fact and conclusions of law, holding as a conclusion of law that the sweet chocolate and sweet milk chocolate manufactured and sold by respondents were "candy" within the meaning of the applicable statutes. (R. 27.) Statements of fact in its opinion which the court adopted as findings of fact included the following (R. 27, 33):

> The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers, to be retailed in candy stores as well as in drug stores, grocery stores and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks and small pieces of various sizes and shapes, usually attractively dressed up and offered under various names. * * * One of the plaintiffs describes the article as a "confection" in some of its labels and display matter. * * *

Upon appeal the judgments were reversed by the Circuit Court of Appeals for the Third Circuit, which held that the collection of the taxes upon the products of respondents was not authorized. (R. 154.)

The sixteen cases were tried together in the District Court and there was but one argument in the Circuit Court of Appeals, and each court decided all of the cases in a single opinion. (R. 32, 147–148.) By stipulation of the parties filed in the Circuit Court of Appeals in twelve of the cases it was agreed that the decisions in those twelve cases should be controlled by and conform to the ultimate decisions in Nos. 4157, 4166, 4169, and 4172. Separate printed records have been prepared and filed in those four cases only, but these four records are records for all sixteen cases. (See, for example, R. 154.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that the excise taxes imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 upon "candy" sold by the manufacturer were not applicable to the sweet chocolate and sweet milk chocolate manufactured and sold by respondents in various forms and sizes.

(2) In holding that the regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, classifying sweet chocolate and sweet milk chocolate as "candy" within the meaning of those sections of those Acts, were unauthorized by law.

(3) In holding that respondents were entitled to recover the excise taxes paid by reason of the manu-

facture and sale of sweet chocolate and sweet milk chocolate in various forms and sizes.

REASONS FOR GRANTING THE WRITS

(1) The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the First Circuit in *Malley* v. *Walter Baker & Co.*, 281 Fed. 41, wherein it was held that sweet chocolate is "candy" within the meaning of Section 900 of the Revenue Act of 1918, imposing excise taxes.

(2) The Circuit Court of Appeals has held invalid regulations of long standing under which the liability of many other taxpayers has been determined. This holding is in direct conflict with the holding in the *Baker case* (281 Fed. 41, 46), and is also inconsistent with the holding in *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, 96 (certiorari denied, 280 U. S. 579), in which the Court of Claims upheld the regulation as applied to certain coated popcorn products. The holding of the Circuit Court of Appeals failed to apply the principle that the reenactment in a later Act of the provision construed by the Department is "persuasive evidence of legislative approval of the regulation," enunciated and applied by this Court in *Brewster* v. *Gage*, 280 U. S. 327, 337, and other cases there cited.

(3) The Circuit Court of Appeals has rejected the consistent Departmental construction of the statute, in spite of the rule that such construction

should not be disturbed except for weighty reasons. *Brewster* v. *Gage*, 280 U. S. 327, 336, and cases there cited.

(4) Other cases involving the same question are now pending in the courts and a final decision by this Court will establish a rule for the settlement of those cases.

(5) The sixteen instant cases involve amounts aggregating about $8,000,000 and justify the consideration of this Court despite the fact that the excise tax was repealed by Section 1100 of the Revenue Act of 1924.

Wherefore it is respectfully submitted that this petition for writs of certiorari to review the judgments of the Circuit Court of Appeals for the Third Circuit should be granted.

THOMAS D. THACHER,
Solicitor General.

SEPTEMBER, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The final opinion of the District Court for the Eastern District of Pennsylvania (R. 32) and the opinion of the Circuit Court of Appeals (R. 148) are unreported.

JURISDICTION

The judgments of the United States Circuit Court of Appeals were entered on June 6, 1930. (R. 154.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The sole question is whether the excise taxes imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 on the sale by the manufacturer of "candy" are applicable to sweet chocolate and sweet milk chocolate in blocks, bars, and small pieces, suitable for consumption, sold to be retailed in candy and other stores.

STATUTES AND REGULATIONS INVOLVED

These are printed in the Appendix, pp. 13–18, *infra*.

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STATEMENT

A statement of the facts and the errors relied on will be found in the petition.

ARGUMENT

The primary purpose of the pertinent statutes was to lay excise taxes upon the sale of luxuries as distinguished from necessities. *Malley* v. *Walter Baker & Co.*, 281 Fed. 41, 45; *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, 97. The regulations promulgated by the Commissioner of Internal Revenue gave recognition to this limited scope of the statutes by excluding from the operation of the tax "bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste." (Regulations 47, Article 22, approved May 1, 1919, p. 14, *infra*.) This regulation was revised in December, 1920 (pp. 15–16, *infra*), so as to exclude from the operation of the tax "cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in

which it is then sold." It is conceded that the products as to which the taxes in question were paid do not come within the foregoing excluded classes. (R. 83.)

The evidence shows that sweet chocolate of the kind upon which the taxes were paid is commonly sold by candy wholesalers to be retailed in candy stores, as well as in drug stores, grocery stores, and cigar stores; that it is sold in the candy departments of department stores; that it is wrapped and sold in attractive packages in bars, blocks, and small pieces of various sizes and shapes (sometimes containing nuts); that such packages were given names which would appeal to candy consumers (R. 33, 81–96); and that one of the respondent's labels and advertising matter described its product as a "confection." (R. 23.) In holding that such products were excluded from the excise tax on "candy," we submit that the Circuit Court of Appeals has taken from the Act "a great deal of utility and makes [the statute] miss its purpose." *Cf. Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, 506.

The Revenue Act of 1918 imposed the tax upon the sale of "candy" by a manufacturer without attempting to define the term. Pursuant to statutory authority, the Commissioner of Internal Revenue promulgated the regulations which expressly included sweet chocolate of the kind here taxed (pp.

13-14, *infra*), and the Treasury Department has consistently applied the regulations and collected excise taxes upon the sales of such products.

The Circuit Court of Appeals rested its decision upon its conclusion that Congress intended to exclude such products from the excise taxes. The statutes themselves bear no evidence of any such intent but the Circuit Court of Appeals has given much weight to the fact that in earlier Tariff and Internal Revenue Acts candy, generally called "sugar candy," and chocolate have been separately classified. Because chocolate has been heretofore classified in Tariff Acts separately from candy the Circuit Court of Appeals holds that it must be presumed that when Congress taxed candy alone it intended to exclude chocolate. We submit that no such presumption should be indulged and that a classification otherwise appropriate should not be rejected merely because for other purposes Congress elected to tax chocolate products separately from other candy. The rule has been applied in the past in determining what rate of tax is applicable, but applying the rule in these cases results in altogether excluding sweet chocolate and sweet milk chocolate from the tax.

The Revenue Acts of 1918 and 1921 placed a luxury tax on "candy" and it should be borne in mind

that the products involved in these cases are not all kinds of sweet chocolate and sweet milk chocolate, but only sweet chocolate and sweet milk chocolate packed and offered for sale in packages of convenient size and form so that they might be readily consumed and that they were offered for sale in the places where the candy consumer customarily trades.

The regulations have been held valid as applied to sweet chocolate by the Circuit Court of Appeals for the First Circuit in *Malley* v. *Walter Baker & Co.*, 281 Fed. 41. In *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, the regulations were held valid as applied to certain commodities other than sweet chocolate, and this Court denied certiorari, 280 U. S. 579.

The Revenue Act of 1921 reenacted, without change except in rates, the excise tax on the sale of "candy" by the manufacturer while the regulations under the 1918 Act were in effect. As this Court has said in several cases, Congress, by reenactment without change of a statute which has received departmental construction, is considered to have adopted such construction. *United States* v. *G. Falk & Brother*, 204 U. S. 143, 152; *United States* v. *Hermanos y Compania*, 209 U. S. 337, 339; *National Lead Company* v. *United States*, 252 U. S. 140, 146.

CONCLUSION

In view of the foregoing it is respectfully submitted that writs of certiorari should be granted.

THOMAS D. THACHER,
Solicitor General.

G. A. YOUNGQUIST,
Assistant Attorney General.

CLAUDE R. BRANCH,
SEWALL KEY,
J. LOUIS MONARCH,
Special Assistants to the Attorney General.

C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue,

HARRISON F. MCCONNELL,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

SEPTEMBER, 1930.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Section 900 of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1122, so far as material, is as follows:

> There shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> * * * * *
>
> (9) Candy, five per centum.

Section 900 of the Revenue Act of 1921, c. 136, 42 Stat. 227, 291, contained a similar provision, the rate of tax being three per centum.

Section 1309 of the Revenue Act of 1918, 40 Stat. 1143, is as follows:

> That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act.
>
> * * * * *

Section 1303 of the Revenue Act of 1921, 42 Stat. 309, is similar.

Article 22 of Regulations 47 of the Commissioner of Internal Revenue, "Relating to the Excise

Taxes on Sales by the Manufacturer," promulgated May 1, 1919, and approved by the Secretary of the Treasury, is as follows:

> Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glacé or candied fruits and nuts, popcorn and other cereals or cereal products mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate whether plain or mixed with fruits or nuts; and all similar articles however designated. It does not include, however, cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto, showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which

he has bought from another manufacturer and on which he has performed no further process of manufacture the tax attaches only to such portion of the goods sold as have been manufactured by him.

Subsequently these regulations were revised in December, 1920, to read as follows:

ART. 22. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolated-covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision; popcorn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims (see art. 16, Regulations 51); sweetened licorice not taxed as cough drops under section 907; sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate

which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items.

Regulations 47, issued under the 1921 Act, provided:

ART. 19. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or

candied fruits and nuts not specified in paragraph (b) of this subdivision; pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies, plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims; sweetened licorice; sweet chocolate and sweet-milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed sep-

arately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items.

Nos. 426-441

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CHARLES ELMORE CRO

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In the Supreme Court of the United States

OCTOBER TERM, 1930

B. D. McCAUGHN, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

B. D. McCAUGHN, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, PETITIONER, *v.* HERSHEY CHOCOLATE CO.

EST. B. F. DAVIS, COLLECTOR, PETITIONER, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, PETITIONER, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, PETITIONER, *v.* KLEIN CHOCOLATE CO.

BLAKELY D. McCAUGHN, COLLECTOR, PETITIONER, *v.* KLEIN CHOCOLATE CO.

EST. E. LEDERER, COLLECTOR, PETITIONER, *v.* WILBUR SUCHARD CHOCOLATE CO.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS

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In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 426

B. D. McCAUGHN, COLLECTOR, PETITIONER

v.

HERSHEY CHOCOLATE CO.

(Also Nos. 427–441, the titles of which are set out on the cover of this brief)

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the District Court (R. 20)[1] is not reported. The opinion of the Circuit Court of Appeals (R. 92) is reported in 42 F. (2d) 408.[2]

[1] Unless otherwise specified, all references in this brief are to the record filed in Nos. 426 to 431. The four records are very similar. The District Court disposed of all of the cases in one opinion. It adopted its statements of fact in the opin-

JURISDICTION

The judgments sought to be reviewed were entered June 6, 1930. (R. 98.) Petitions for certiorari were filed on September 6, 1930, and were granted on October 20, 1930. The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

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ion as findings of fact, and, in addition, granted certain requests for findings of fact made by the plaintiffs. (R. 16.) The vital facts are the same in all of the cases, although there is, of course, some difference between findings made in pursuance of requests of the different respondents, and the pleadings and the testimony are not exactly the same in all of the cases.

The District Court first filed an opinion on November 22, 1928. (R. 9.) After a reargument it filed an opinion dated January 17, 1929, making certain corrections in its original opinion (R. 17), and on January 22, 1929, it filed a completely new revised opinion (R. 20). Two of these three opinions of the District Court are also printed in the bill of exceptions—i. e., the opinion of November 22, 1928 (R. 69) and the opinion of January 17, 1929 (R. 77). Each of these opinions applies to all of the cases.

The Circuit Court of Appeals rendered but one opinion for all of the cases. (R. 92.)

By stipulations filed in the Circuit Court of Appeals under date of July 5, 1929, in five *Hershey cases*, Nos. 4158 to 4162, inclusive, it was agreed that the decisions in those cases should be controlled by and conform to the ultimate decision in case No. 4157. (R. 99–103.) It was further agreed by stipulations of the same date that three *Klein cases*, Nos. 4163 to 4165, inclusive, should follow the ultimate decision in No. 4166 (Klein R. 100); that two *Wilbur cases*, Nos. 4167 and 4168, should follow No. 4169 (Wilbur R. 95); and that two *York cases*, Nos. 4170 and 4171, should follow No. 4172 (York R. 92).

QUESTION PRESENTED

Is the excise tax imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 on "candy" sold by the manufacturers applicable to sweet chocolate and sweet milk chocolate in blocks, bars, and small pieces, suitable for consumption sold by the manufacturers to be retailed in candy and other stores?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in Appendix A, *infra*, pp. 31–38.

STATEMENT

The four respondent manufacturing corporations brought suits in the United States District Court for the Eastern District of Pennsylvania to recover amounts aggregating about $8,000,000 paid as excise taxes under the provisions of Title IX, Section 900 (9) of the Revenue Act of 1918, and Title IX, Section 900 (6) of the Revenue Act of 1921, on the sale by respondents of sweet chocolate and sweet milk chocolate in various forms and sizes. The taxes were paid monthly over a period beginning in 1918 and ending in 1924. Since different individuals held the office of Collector of Internal Revenue during the period involved, sixteen separate suits were filed by respondents and are referred to in the record of the cases docketed in the Circuit Court of Appeals, as follows:

	In circuit court of appeals	In this court
Hershey v. McCaughn	[1] No. 4157	No. 426
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Hershey v. Lederer	4160	429
Hershey v. McCaughn	4161	430
Hershey v. Davis	4162	431
Klein v. Davis	4163	432
Klein v. Lederer	4164	433
Klein v. Lederer	4165	434
Klein v. McCaughn	[1] 4166	435
Wilbur v. Lederer	4167	436
Wilbur v. Lederer	4168	437
Wilbur v. McCaughn	[1] 4169	438
York v. Davis	4170	439
York v. Lederer	4171	440
York v. McCaughn	[1] 4172	441

[1] Cases for which printed records were prepared and filed.

The sixteen cases were tried together in the District Court. Written stipulations waiving a jury were filed. (R. 9.) The District Court made special findings of fact and conclusions of law, holding that "sweet chocolate" and "sweet milk chocolate" manufactured and sold by the respondents were "candy" within the meaning of the applicable statutes. (R. 16–17.) Statements of fact in its opinion, which the court adopted as findings of fact, included the following (R. 21):

> The evidence is that sweet chocolate of the kind upon which the tax was paid is commonly sold by candy wholesalers to be retailed in candy stores as well as in drug stores, grocery stores, and cigar stores; that department stores have it for sale in their candy departments; that it is sold in bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and

> shapes, usually attractively dressed up and offered under various names. * * * One of the plaintiffs describes the article as a "confection" in some of its labels and display matter.

The record also shows that sweet chocolate of the kind upon which the taxes were paid is consumed in the same manner as candy; that it is eaten in small quantities from the hand as a sweetmeat; that it is wrapped and sold in attractive packages in bars, blocks, and small pieces of various sizes and shapes (sometimes containing nuts); and that such packages were given names which would appeal to candy consumers. (R. 49–62.)

The evidence discloses that the Hershey Chocolate Company manufactured and advertised certain of its products as "Milk-Maid Sweet Chocolate Kisses," "Silver Tops," "Sweet Milk Chocolate Batons," "Homestead Gems," "Souvenirs," "Sunny Boys," "Chocolate Delights," "Fifty-Fifty Almond Bars," "Bon Bons," "Neopolitans," "Croquettes," etc. (R. 49, 50.) In the advertising matter distributed by the Hershey Company these terms were elaborated upon in many instances, one example being "Exhibit O" (R. 50; Exhibit not printed), where the words, "Hershey's Kisses Are Delicious" appear; and upon other labels in which the small Almond Bars are wrapped appear the phrase, "A Sweet to Eat."

The Wilbur-Suchard Chocolate Company from the outset designated itself as a manufacturer of

chocolate confectionery. Its trade-mark included the words "Solid Chocolate Confections." This company also manufactured a household chocolate and cocoa. No tax was imposed on that product. The smaller packages of its sweet chocolate and sweet milk chocolate upon which the tax was paid bore labels appropriate to the candy trade. Certain of its products were designated as "Wilburmilk," "Wilbur Buds," "Milk Chocolate Almond Bars," "Sweet Milk Chocolate Pats," "Velour Chocolate," "Superfine Milk Bon Bons," "Vanilla Bon Bons," "Fine Vanilla Sweet Chocolate Fancy Shapes," "Cameos," "Ceylon Wafers," "Chocolate cigarettes," "Gold Medal Water," "Almond Wilburmilk," "Honey Dew," etc. (Wilbur R. 62; Exhibits not printed.) (See also Hershey R. 21.)

The District Court rendered judgments in favor of the petitioners. (R. 84.) Upon appeal, the judgments were reversed by the Circuit Court of Appeals for the Third Circuit. (R. 92, 98.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred—

(1) In holding that the excise taxes imposed by Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 upon "candy" sold by the manufacturer were not applicable to the sweet chocolate and sweet milk chocolate manufactured and sold by respondents in various forms and sizes.

(2) In holding that the regulations promulgated by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, classifying sweet chocolate and sweet milk chocolate as "candy" within the meaning of those sections of those Acts, were unauthorized by law.

(3) In holding that respondents were entitled to recover the excise taxes paid by reason of the manufacture and sale of sweet chocolate and sweet milk chocolate in various forms and sizes.

SUMMARY OF ARGUMENT

I

Section 900 of each of the applicable Revenue Acts (that of 1918 and that of 1921) imposes an excise tax upon "candy" sold by the manufacturer. The respondent taxpayers were all manufacturers. The taxes here involved were assessed on sales of sweet chocolate and sweet-milk chocolate in various kinds of small pieces, usually attractively dressed, of the kind commonly sold by candy wholesalers to be retailed in candy stores, as well as in drug stores, grocery stores, and cigar stores. The only question is whether these products were "candy" within the meaning of the statutes. The word occurs in a paragraph by itself and is evidently a comprehensive term intended to describe a class of articles. It is not defined in the act, and nowhere has Congress ever attempted to define the word "candy." None of the law dictionaries mentions the word. The standard dictionaries give definitions of "candy"

which are broad enough to include the articles in question. Applying the test of construing statutory words in their ordinary and usual sense, we conclude that candy includes the products in question.

Anyway, such a construction is an admissible one. Consequently the Treasury Department had authority to adopt it. And it has consistently adopted it in regulations which were promulgated soon after the passage of the 1918 Act and which had been continued under that Act and the 1921 Act up to the present time. This administrative construction was expressly approved in the only case other than the instant cases which has considered the regulations as applied to sweet chocolate. *Malley* v. *Walter Baker & Co.*, 281 Fed. 47 (C. C. A. 1st, 1922). The regulations construing the word "candy" have also been upheld as applied to certain popcorn products in three cases decided by the Court of Claims, in all of which this Court denied certiorari. If the decision of the Circuit Court of Appeals in the instant case is correct, it would seem obvious that all of these decisions were wrong, and an affirmance of the instant decision would result in upsetting the consistent administrative practice which has been followed for years. The case is consequently one which calls for the application of the principle that an administrative construction of tax statutes should not be upset unless plainly wrong. Moreover, the statutory provision in question was reenacted in the Act of 1921, after the

regulation had been in effect for more than two years, and this reenactment is evidence of legislative approval of the regulation.

II

We submit that nothing in the legislative history of the 1921 Act shows that Congress did not intend the excise tax to apply to sweet chocolate. The Circuit Court of Appeals found some support for its decision in "an examination of the record of deliberations and discussion in the Committees and also upon the floor of the Senate when the 1921 Act was under consideration." We submit that it was improper to consult most of these sources at all, and anyway that they do not show that Congress understood that the tax did not apply to sweet chocolate.

III

The Tariff Acts do not show that "candy" may not include sweet chocolate. The Circuit Court of Appeals held that because chocolate was made the subject of a separate duty from candy in earlier Tariff Acts it must be presumed that when Congress imposed a tax upon "candy" in the Revenue Act of 1918 it intended to exclude sweet chocolate and sweet milk chocolate. The Tariff Acts, however, do not show that Congress has made a sharp distinction between "candy" on the one hand and "chocolate" on the other. The duties prescribed by these Acts are laid without exception on "sugar candy" and generally, as in the Tariff Acts of 1909,

1913, and 1922, the phrase is "sugar candy, and all confectionery not specially provided for in this section." By another paragraph in the same section the tax is laid on the importation of "chocolate" of all kinds. Where Congress in a Tariff Act uses two terms in classifying property subject to duty, one general and the other specific, articles answering the specific description will, of course, be subject to the duty imposed by the specific language. But it does not follow that if chocolate had not been specifically mentioned it would not have been subject to the duty laid by the more general paragraph taxing "sugar candy, and all confectionery not specially provided for in this section." Furthermore, the purposes sought to be accomplished by the Tariff Acts were different from those sought through the excise taxes imposed by the Revenue Acts of 1918 and 1921. There was reason for imposing one rate of duty on products composed chiefly of sugar, which is produced in the United States, and another rate on products composed chiefly of chocolate, which is not. No reason exists for excluding from an excise tax which includes candy generally those forms of candy composed largely of chocolate.

IV

The circulars of the Department of Agriculture throw no light upon the meaning of the word "candy" in the Revenue Acts of 1918 and 1921. The circulars upon which the respondents rely were

promulgated under authority of the Act of June 3, 1902, which made an appropriation "to enable the Secretary of Agriculture * * * to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various States and of the courts of justice." The definitions made in the circulars issued under this Act are consequently made for the purpose of establishing standards of purity in foodstuffs, and the classifications made thereunder are directed solely to that end. There is no indication whatever in the statute that the Secretary of Agriculture should have power to define what is or is not "candy" for any purpose, and the Revenue Acts contain no reference to his classifications.

ARGUMENT

I

THE WORD "CANDY" AS USED IN SECTION 900 (9) OF THE REVENUE ACT OF 1918 AND SECTION 900 (6) OF THE REVENUE ACT OF 1921 INCLUDES THE SWEET CHOCOLATE AND SWEET MILK CHOCOLATE WHICH WAS TAXED IN THESE CASES

The two applicable Revenue Acts, Section 900 (9) of the 1918 Act and Section 900 (6) of the 1921 Act,[2] provide:

> That there shall be levied, assessed, collected, and paid upon the following articles

[2] The entire texts of Section 900 of each of the two Acts are printed in the Appendix, pp. 31–34, *infra*, in parallel columns, so as to show the differences between the two Acts. There is no difference in the provisions relating to candy except the rate.

sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased * * *:

Candy [5 per centum in the 1918 Act and 3 per centum in the 1921 Act].

The taxes here involved were assessed on articles sold by the respondents, who were all manufacturers. The articles sold were of the kind commonly sold by candy wholesalers to be retailed in candy stores, as well as in drug stores, grocery stores, and cigar stores, etc. The articles were bars (sometimes containing nuts or almonds), blocks, and small pieces of various sizes and shapes, usually attractively dressed. They were offered under various names, some of which are mentioned on pp. 5–6, *supra*. Department stores sell these articles in their candy departments.

The only question involved in these cases is whether these products, which were sweet chocolate and sweet milk chocolate, were "candy" within the meaning of the provisions of the statutes quoted above. We maintain that they were.

In each of the above Acts the word "candy" appears by itself in a separate subparagraph. It is not, like some of the other articles taxed, merely one item in a detailed list of related products, and the Act contains no definition of the word. The fact that the word is not qualified and that it does not appear merely as part of a detailed enumeration of related articles indicates that it was

intended as a comprehensive term to describe a class of articles.

Never has Congress attempted to define the word "candy."[3] None of the law dictionaries, as far as we are aware, mentions the word.[4] The standard dictionaries give definitions of "candy" which are broad enough to include the articles in question.

Among them are the following:

Century Dictionary & Encyclopedia:

A solid preparation or confection of sugar or molasses, or both, boiled, inspissated, and worked by pulling to a crystalline consistence, either alone or combined with flavoring and coloring substances; hence, any confection having sugar as its basis, however prepared.

Webster's New International Dictionary:

A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystalizing, molding, or working it into the required shape. It is

[3] A discussion of the use of the word in the Tariff Acts appears at pp. 24–28, *infra*. See pp. 28–30, *infra*, for the use of the word by the Department of Agriculture.

[4] It does not appear in any of the following: Bouvier's Law Dictionary, Black's Law Dictionary, Sweet's Law Dictionary, Burrill's Law Dictionary, Tomlin's Law Dictionary, Georgia Words & Phrases by Ryman, Abbott's Law Dictionary, Rapalje & Lawrence's Law Dictionary, Winfield's Adjudged Words and Phrases, Anderson's Dictionary of Law, McCulloch's Commercial Dictionary, Burn's Law Dictionary, Jacob's Law Dictionary, English's Dictionary of Words and Phrases, Lawson's Concordance, Stroud's Judicial Dictionary.

usually flavored, or colored, and often contains fruit, nuts, etc. Also any sweetmeat made of, or coated with, a preparation of sugar or molasses; a piece of confectionery. *Standard Dictionary:*

Sugar or molasses, or both, formed into a confection by any means, but usually by boiling. Candy, which is made into a great variety of forms, is generally flavored and often colored with various substances, and sometimes combined with nuts, chocolate, etc.

No evidence as to the use of the word in commerce or common speech was presented in the District Court. That court said (R. 24):

Certainly the word candy has never acquired a technical or scientific definition, and in fact there are few words in the language less likely to be scientifically defined. Nor, so far as the record shows, has it any commercial meaning differing from the popular one. It is a word of everyday household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.

Although the Circuit Court of Appeals said (R. 94) that this "is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion," we submit that the District Court was correct.

Applying the test of construing statutory words in their ordinary and usual sense,[5] we conclude that "candy" includes the products in question.

Anyway, such a construction is an admissible one. Consequently the Treasury Department, which is charged with the enforcement of the law, had authority to adopt this interpretation.[6] And it has so construed it consistently from the date of the passage of the Act of 1918 until the present time.

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[5] *DeGanay* v. *Lederer*, 278 U. S. 378, 381. See also *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253.

[6] Section 1309 of the 1918 Act provided:

"That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act."

Section 1303 of the 1921 Act contains identical language. The Department's construction of the terms "parts" and "accessories" which occur in other paragraphs of the same section of the statute was upheld in *Universal Battery Co.* v. *United States*, 281 U. S. 580, 582. See also *Fawcus Machine Co.* v. *United States*, No. 40, October Term, 1930, decided January 5, 1931.

The regulations promulgated by the Commissioner gave recognition to this limited scope of the statutes by excluding from the operation of the tax "bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste" and sweet chocolate which was not to be consumed in the form in which it was sold. It is conceded that the products as to which the taxes in question were paid do not come within these excluded classes. (R. 21.)

In holding that the products taxed were excluded from the excise tax on "candy," we submit that the Circuit Court of Appeals has taken from the Act "a great deal of utility and makes [the statute] miss its purpose." Cf. *Carbon Steel Co.* v. *Lewellyn*, 251 U. S. 501, 506.

Thus, on May 1, 1919, by Article 22 of Regulations 47 (pp. 34–35, *infra*) the Commisioner of Internal Revenue, with the approval of the Secretary of the Treasury, announced the following construction of the language:

> Candy within the meaning of the act includes * * * sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts.

This Article expressly excluded bitter chocolate "which needs the addition of sugar before it becomes pleasing to the taste." A revision of this Article in December, 1920 (*infra*, pp. 35–37), added to the Article a provision that candy—

> does not include * * * sweet chocolate * * * sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Article 19 of Regulations 47, promulgated under the 1921 Act on January 6, 1922 (*infra*, pp. 37–38), contained the same provisions in regard to sweet chocolate and sweet milk chocolate as did the previous regulations, as revised. This later regulation has been in effect at all times since the passage of the 1921 Act. The excise taxes imposed by Sec. 900 of the 1921 Act were repealed as of July 2, 1924, by Section 1100 (a) of the Revenue Act of 1924, 43 Stat. 253, 352.

This administrative construction of the word "candy" was expressly approved in the only case other than the instant case which has considered it. *Malley* v. *Walter Baker & Co.*, 281 Fed. 41 (C. C. A. 1st, 1922), reversing the District Court for the District of Massachusetts, whose decision is unreported.[7] The Court of Claims has upheld other provisions of the same regulations as applied to certain pop-corn products in *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, certiorari denied, 280 U. S. 579; *Cracker Jack Co.* v. *United States*, 67 C. Cls. 98, certiorari denied, 280 U. S. 580; *Shotwell Manufacturing Co.* v. *United States*, 67 C. Cls. 152, certiorari denied, 280 U. S. 580.[8]

If the decision of the Circuit Court of Appeals in the instant case is correct, it is obvious that the decision of the Circuit Court of Appeals on this identical point in the *Baker case* in 1922 was wrong and that all of the taxes which have been collected from manufacturers of sweet chocolate in the past were wrongfully collected. On this hypothesis, it would also seem that all of the decisions of the Court of Claims above referred to were wrong and that all taxes which have been collected from manu-

[7] The entire opinion of the Circuit Court of Appeals in this case is printed as an appendix, pp. 43–53, *infra*.

[8] In *Funsten Co.* v. *United States*, 65 C. Cls. 292, the Court of Claims held that stuffed dates were not taxable as candy. They did not come within the definition of candy in the regulations.

facturers of the sort of products involved in them were wrongfully collected. An affirmance now of the decision below will result in upsetting the consistent administrative practice which has been followed for years and will result in according more favorable treatment to the respondents here than has been accorded to other similar manufacturers. The case is consequently one which calls for the application of the principle that an administrative construction of tax statutes should not be upset unless plainly wrong. See *Fawcus Machine Co.* v. *United States*, No. 40, October Term, 1930, decided January 5, 1931; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583; *Brewster* v. *Gage*, 280 U. S. 327, 336, and cases there cited.

Moreover, the statutory provision in question was reenacted in the Act of 1921 after the regulations had been in effect for more than two years. The only change in regard to candy was a change in the rate. Certain other articles which had been subject to the excise tax provisions of the 1918 Act were omitted from the 1921 Act. (See pp. 31–34, *infra*.) This reenactment is evidence of legislative approval of the regulation. See *Brewster* v. *Gage*, 280 U. S. 327, 337, and cases there cited; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583; *Fawcus Machine Co.* v. *United States*, No. 40, October Term, 1930, decided January 5, 1931.

II

NOTHING IN THE LEGISLATIVE HISTORY OF THE 1921 ACT SHOWS THAT CONGRESS DID NOT INTEND THE EXCISE TAX TO APPLY TO SWEET CHOCOLATE

The Circuit Court of Appeals found some support for its conclusion from "an examination of the record of deliberations and discussions in the committees and also upon the floor of the Senate, when the 1921 Act was under consideration." (R. 96.) It was apparently influenced by three matters which its examination revealed: (1) Statements made to the Ways and Means Committee of the House; (2) discussions on the floor of the Senate; (3) the fact that the Secretary of the Treasury submitted to the Committee a definition of the word "candy" which included sweet chocolate and sweet milk chocolate, with the suggestion that it might be incorporated in the law, and that this was not incorporated in the law.

We submit that none of these matters shows that either branch of Congress believed that in passing the Act of 1921 it was not taxing sweet chocolate. The outstanding, conclusive fact is that the Treasury Department had construed the word "candy" in the 1918 Act to include sweet chocolate and sweet milk chocolate, as is shown by the regulations above quoted. As this Court said in *National Lead Co. v. United States*, 252 U. S. 140, 147, "Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the

Government." There is no reason why the presumption should not apply in the instant case.

It is hardly likely that anyone thought that the Government would acquiesce in the decision of the District Court in Massachusetts, and if any members of Congress gave the decision any weight it is quite possible that they believed that the decision would be reversed—as it was.*

Statements to Committees and on the floor of the Senate should not be considered. *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *Lapina* v. *Williams*, 232 U. S. 90; *United States* v. *Trans-Missouri Freight Association*, 166 U. S. 209, 316–318.

The statements to the Committees were made by Hubert B. Fuller, an attorney representing various confectioners' associations. His plea was to have the tax on candy abolished entirely, and in the course of his remarks he referred to the decision of the District Court in Massachusetts. It is signifi-

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*As a matter of fact (as we have ascertained from an examination of the files in the Department of Justice and by communication with the Clerk of the District Court in Massachusetts), in July, 1921, the Department of Justice decided to appeal the case and the bill of exceptions was filed on July 5, 1921, which was before the bill which became the Act of 1921 came before either House of Congress. The appeal was not allowed until after the passage of the Act. None of these facts appear in the record, and there is no direct evidence that they were known to Congress. On the other hand, there is no evidence that members in charge of the bill did not know these facts.

cant that in the formal brief filed by the National Confectioners' Association at this time various articles are mentioned as competing with candy without being subject to the excise tax. In the list chocolate and sweet milk chocolate are not mentioned. (See Hearings on Internal Revenue Revision before the Committee on Ways and Means in 1921, pp. 244–258.)

The reports of the Committees contain no discussion of the matter.

An examination of the report of the debate on the floor of the Senate, upon which the court relied, shows that the member of the Committee in charge, Senator Penrose, gave no indication as to his opinion about the matter. Evidently some of the Senators believed that sweet chocolate was taxed as candy, but others did not. (Congressional Record, 67th Congress, 1st Session, Volume 61, part 7, pp. 7071–7075.) The situation presented here shows the futility of trying to ascertain the intention of Congress from the sources to which the Circuit Court of Appeals and the respondents have gone, and illustrates the wisdom of the rule laid down by this Court, that these matters are not a safe guide in ascertaining the purpose and meaning of the lawmaking body.

The court below was also influenced by the fact that suggestion had been made to the Ways and Means Committee through the Secretary of the

Treasury that the word "candy" should be defined in the Act so as to include the articles in question as well as a number of other articles. An examination of the communication to the Ways and Means Committee shows that no *recommendation* to this effect was made. The material to which the court referred was sent to the Chairman of the Ways and Means Committee on November 3, 1919, nearly two years before the Revenue Act of 1921 was passed. As appears from the letter of transmittal from the Secretary of the Treasury to the Chairman of the Committee,[10] the material transmitted was a compilation of suggestions "which have occurred to the various officers of the Internal Revenue Bureau, * * * with similar suggestions received from outside sources." These suggestions occupied over fifty printed pages.[11]

The letter of transmittal states, "This material is not in the form of recommendations by the department, as a decision has not yet been reached

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[10] A complete copy of the letter of transmittal appears in Appendix B. (Pages 39–40, *infra.*)

[11] This is evidently the material which was introduced in evidence by the taxpayers as Exhibit 11. (R. 44.) It is printed in the form of a pamphlet bearing the following caption:

"NOTES ON THE REVENUE ACT OF 1918, submitted by the Secretary of the Treasury, without recommendation at this time.

"Printed for the use of the Committee on Ways and Means, House of Representatives, Part I. Washington Government Printing Office, 1919."

with respect to all of the suggestions; and, indeed, the department entertains serious doubt as to the advisability of the adoption of some of them."

Nothing in the pamphlet shows that the Secretary of the Treasury recommended a change in the provisions relating to candy. As to this, the pamphlet states merely:

> Section 900 (9). Tax on candy: This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.
>
> It has been suggested that the term "candy" should be defined.
>
> The following definition of the term "candy" is suggested:
>
> Strike out subdivision (9) and insert: "Candy, 5 per centum. *Candy within the meaning of this subdivision* * * *" [Then follows a definition of candy substantially the same as that contained in the Regulations then in force. (Pages 34–35, *infra*.).]

The discussion of Sections 900 and 902 of the Act occupies six pages, and consists mostly of suggested definitions of various words occuring in the Act, such as "sculpture," "paintings," "bronzes," etc. None of these definitions was adopted in the Act of 1921. If all of them had been, the Act would have been materially lengthened.

There is no reason to believe that the Ways and Means Committee did not appreciate the fact that the articles mentioned in Sections 900 and 902 had been defined by regulations. Its failure to define

the various articles in the Act of 1921 would not seem to indicate disapproval of the existing definitions of the articles in the regulations, but rather to indicate approval of the existing system under which the matter of definition was left to regulations of the Treasury Department and also to indicate satisfaction with the definitions of those terms which had been promulgated by the Treasury Department in regulations. We consequently submit that the document upon which the Circuit Court of Appeals relies furnishes no support whatever for its conclusion that the Ways and Means Committee intended to exclude sweet chocolate and sweet milk chocolate from the excise taxes which were laid generally on "candy."

III

THE TARIFF ACTS DO NOT SHOW THAT "CANDY" MAY NOT INCLUDE SWEET CHOCOLATE

The Circuit Court of Appeals felt that the fact that chocolate was made the subject of a separate duty from candy in earlier Tariff Acts, is convincing proof that when Congress placed a tax upon "candy" in the Revenue Act of 1918 it intended to exclude sweet chocolate and sweet milk chocolate. We submit that the court below erred in giving such effect to the use of the words in the earlier tariff laws.[12] We do not deny that tariff

[12] References to numerous Tariff Acts are given in Appendix C, pp. 41–42, *infra*.

laws may in some cases throw light upon the proper construction of internal revenue laws. See *Seeberger* v. *Castro*, 153 U. S. 32.

But Congress has not adopted a consistent policy of making a sharp distinction between "candy" on the one hand and "chocolate" on the other. The word "candy" does not appear alone in a single one of the Acts referred to by the respondent in the suit below. The duties prescribed by these earlier Acts are usually laid upon "sugar candy," and generally, as in the Tariff Acts of 1909, 1913, and 1922, the phrase is "sugar candy, and all confectionery not specially provided for in this Section." By another paragraph in the same section a duty is laid on the importation of "chocolate." Of course, when chocolate is specifically provided for, it is not covered by the paragraph laying a duty on "sugar candy, and all confectionery not specially provided for in this section." That was the holding in *Arthur* v. *Stephani*, 96 U. S. 125. Where Congress in a Tariff Act uses two terms in classifying property subject to duty, one general and the other specific, articles answering the specific description will be subject to the duty imposed by the specific language, although they might well have been subject to the duty imposed by the general language had the specific language not been incorporated in the Act. Thus, in *Arthur* v. *Stephani, supra*, this Court said that the case—

> presents the question whether the articles are dutiable under general terms which may

> embrace them, or under that specific language which can be applied to nothing else. That the latter is the rule by which the duty is fixed is too well settled to require argument.

This principle has been applied in various cases arising under the customs laws which were cited by the respondents in the court below. These cases held that sweet milk chocolate is properly classified as chocolate under a Tariff Act containing a general provision levying duties upon "sugar candy, and all confectionery not specifically provided for in this section" and a specific paragraph levying duties upon "chocolate." *In re Austin*, 47 Fed. 873 (C. C. S. D. N. Y.); *In re Schilling*, 53 Fed. 81 (C. C. A. 2d), aff'g, 48 Fed. 547 (C. C. S. D. N. Y.); *United States* v. *McLaughlin & Freeman*, 13 Ct. Cust. App. 404.

But it does not follow that if chocolate had not been specifically mentioned it would not have been subject to the duty laid by the more general paragraph taxing "sugar candy, and all confectionery not specially provided for in this section." In *Forbes Lithograph Co.* v. *Worthington*, 132 U. S. 655, the question was whether certain iron show cards were dutiable as "manufactures of iron" or as "printed matter." This Court said (p. 661):

> "If a duty had been imposed on iron show cards *eo nomine*, the latter would not have been dutiable as "manufactures of iron," any more than "braces and suspenders,"

though made of rubber, were dutiable as "manufactures of rubber," *Arthur* v. *Davies*, 96 U. S. 135, or "artificial flowers," though made of cotton, were dutiable as "manufactures of cotton." *Arthur* v. *Rheims*, 96 U. S. 143. The specific designation would prevail over the general words which otherwise embraced the article.

In Sections 900 of the Revenue Acts of 1918 and 1921 Congress has *not* used two terms, one general and the other specific, both applicable to sweet-milk chocolate, and the question is not under which of two applicable descriptions an article comes. If Congress had used two such terms, no doubt the decisions under the earlier tariff laws would be applicable. Instead, one general comprehensive word—"candy"—was used, and if it does not include the articles in question, their sale was subject to no tax at all.

Furthermore, the purposes sought to be achieved by the Tariff Acts were different from those sought through the excise taxes imposed by the Revenue Acts of 1918 and 1921. Both types of acts are, of course, designed to produce revenue. But the Tariff Acts are also designed to protect industry. In such an act it is natural that sugar and chocolate should be classified separately. Some sugar is produced in the United States; chocolate is not. The purpose of the excise taxes in the Revenue Acts of 1918 and 1921 was to provide revenue by taxing luxuries. Thus, in the report of the Committee on Ways and

Means to the House (House Report No. 767, 65th Congress, 2d Session, p. 33) it was said:

> In recommending excise taxes in the proposed bill your committee has endeavored to select articles that fall within two classes: (1) Articles that are more or less a luxury because of their nature and (2) articles that become in the nature of a luxury when sold for more than a fixed price. The purpose of the committee in recommending these taxes is twofold: (1) To provide revenue and (2) to reduce extravagance.

See also *Malley* v. *Walter Baker & Co.*, 281 Fed. 41, 45, *supra*; *Cracker Jack Co.* v. *United States*, 67 C. Cls. 89, certiorari denied, 280 U. S. 579. Sweet milk chocolate put up for sale as a confection, such as is involved in this case, is, we submit, as much a luxury as other kinds of candy. There is no reason why "chocolate caramels" and "chocolate creams" should be taxed and sweet chocolate should not.

IV

THE CIRCULARS OF THE DEPARTMENT OF AGRICULTURE THROW NO LIGHT UPON THE MEANING OF THE WORD "CANDY" IN THE REVENUE ACTS OF 1918 AND 1921

The respondents contended in the courts below that the proper construction of the word "candy," as used in the Revenue Acts of 1918 and 1921, was to be found in the classification of milk chocolate and sweet milk chocolate made by the Secretary of Agriculture in certain circulars entitled "Standards of Purity for Food Products." In these circulars the Department of Agriculture has classified

milk chocolate and sweet milk chocolate under "tea, coffee, and cocoa products," while "candy" is classified under "sugar and related substances."[14] Neither the District Court (R. 21) nor the Circuit Court of Appeals (R. 98) considered these classifications as in any way controlling on the issue in these cases.

These circulars were promulgated under the Act of June 3, 1902, c. 985, 32 Stat. 286, 296, and later statutes supplementary thereto. This Act made an appropriation "to enable the Secretary of Agriculture * * * to establish standards of purity for food products and to determine what are regarded as adulterations therein, for the guidance of the officials of the various states and of the courts of justice." The definitions made in the circulars

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[14] The circulars referred to are as follows:

Circular No. 10, issued by the Department of Agriculture on November 20, 1903, entitled "Standards of Purity for Food Products";

Circular No. 13, issued by the Department of Agriculture on December 20, 1904, entitled "Standards of Purity for Food Products";

Circular No. 17, issued by the Department of Agriculture on March 9, 1906, entitled "Standards of Purity for Food Products";

Circular No. 19, issued by the Department of Agriculture on June 26, 1906, entitled "Standards of Purity for Food Products";

Circular No. 186 issued by the Department of Agriculture on May 14, 1919, entitled "Standards of Purity for Food Products";

"Food Inspection Decision 165 (generally known as 'F. I. D.')," issued by the Secretary of Agriculture, February 15, 1916; and food inspection decision, No. 191, issued by the Department of Agriculture, January 19, 1923.

issued under this Act are consequently made for the purpose of establishing standards of purity in foodstuffs, and the classifications made are directed solely to that end. There is no indication whatever in the statute that the Secretary of Agriculture should have power to define what is or is not "candy" for any purpose, and the Revenue Acts contain no reference to the circulars of the Secretary of Agriculture.

CONCLUSION

It is respectfully submitted that the judgments of the Circuit Court of Appeals should be reversed.

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MARCH, 1931.

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

STATUTES

REVENUE ACT OF 1918, c. 18, 40 STAT. 1057, 1122

TITLE IX. EXCISE TAXES

SEC. 900. That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentages of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

(4) Pianos, organs (other than pipe organs), piano players, graphophones, phonographs, talking machines, music boxes, and records

REVENUE ACT OF 1921, c. 136, 42 STAT. 227, 291

TITLE IX. EXCISE TAXES

SEC. 900. That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, 5 per centum;

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basketball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commercially known as sporting goods, 10 per centum;

(6) Chewing gum or substitutes therefor, 3 per centum;

(7) Cameras, weighing not more than 100 pounds, 10 per centum;

(8) Photographic films and plates other than moving-picture films, 5 per centum;

(9) Candy, 5 per centum;

(10) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;

(11) Hunting and bowie knives, 10 per centum;

(4) Cameras, weighing not more than 100 pounds, and lenses for such cameras, 10 per centum;

(5) Photographic films and plates (other than moving-picture films), 5 per centum;

(6) Candy, 3 per centum;

(7) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, 10 per centum;

(8) Hunting and bowie knives, 10 per centum;

(12) Dirk knives, daggers, sword canes, stilettos, and brass or metallic knuckles, 100 per centum;

(13) Portable electric fans, 5 per centum;

(14) Thermos and thermostatic bottles, carafes, jugs, or other thermostatic containers, 5 per centum;

(15) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(16) Automatic slot-device vending machines, 5 per centum, and automatic slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(17) Liveries and livery boots and hats, 10 per centum;

(18) Hunting and shooting garments and riding habits, 10 per centum;

(19) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value, 10 per centum;

(20) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes, if sold for more than $15, 10 per centum; and

(21) Toilet soap and toilet-soap powders, 8 per centum;

(9) Dirk knives, daggers, sword canes, stilettos, and brass or metallic knuckles, 100 per centum;

(10) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(11) Automatic slot-device vending machines, 5 per centum, and automatic slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(12) Liveries and livery boots and hats, 10 per centum;

(13) Hunting and shooting garments and riding habits, 10 per centum;

(14) Yachts and motor boats not designed for trade, fishing, or national defense; and pleasure boats and pleasure canoes, if sold for more than $100, 10 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 600 of the Revenue Act of 1917, be in lieu of such tax.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 900 of the Revenue Act of 1918, be in lieu of such tax.

Section 1309 of the Revenue Act of 1918 is as follows:

> SEC. 1309. That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this Act. * * *

Section 1303 of the Revenue Act of 1921 is similar.

REGULATIONS

Article 22 of Regulations 47, "Relating to the Excise Taxes on Sales by the Manufacturer," issued May 1, 1919, under the Revenue Act of 1918, is as follows:

> Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts, popcorn and other cereals or cereal products mixed with or cov-

ered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate-covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, sweet chocolate and sweet milk chocolate, whether plain or mixed with fruits or nuts; and all similar articles, however designated. It does not include, however, cereal breakfast foods, cake, and pastries, nor bitter chocolate, which needs the addition of sugar before it becomes pleasing to the taste. If a manufacturer of glacé or candied fruits, at the time the goods are shipped or sold (whichever is prior), has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer and on which he has performed no further process of manufacture, the tax attaches only to such portion of the goods sold as have been manufactured by him.

These regulations were revised in December, 1920, to read as follows:

ART. 22. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts not specified

in paragraph (b) of this subdivision; popcorn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims (see art. 16, Regulations 51); sweetened licorice not taxed as cough drops under section 907; sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glacé or candied fruit peel and citron, or sweet chocolate, glacé or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In

such cases, if the sale is billed, the container and candy must be billed as separate items.

Article 19 of Regulations 47, issued January 6, 1922, under the Revenue Act of 1921, provides:

ART. 19. *Candy.*—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glacé or candied fruits and nuts not specified in paragraph (b) of this subdivision; pop corn and other cereals or cereal products not specified in paragraph (b) of this subdivision, mixed with or covered with molasses, sugar, or other sweetening agent; hard candies, plain and chocolate-covered marshmallows; candy cough drops sold in bulk and without remedial claims; sweetened licorice; sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts, not specified in paragraph (b) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (b) of this subdivision; and all similar articles however designated; but

(b) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste, glace, or candied fruit peel and citron, or sweet chocolate, glace, or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing, or from other facts in connection with the sale, that it will

not be consumed in the form in which it is then sold.

Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items.

APPENDIX B

LETTER OF TRANSMITTAL ACCOMPANYING "NOTES ON THE REVENUE ACT OF 1918"

THE SECRETARY OF THE TREASURY,
Washington, November 3, 1919.

MY DEAR MR. FORDNEY: In the course of interpreting the war-revenue act of 1918 and framing appropriate regulations a number of suggestions for the amendment of the law have occurred to the various officers of the Internal Revenue Bureau. These suggestions have been recorded and associated with similar suggestions received from outside sources for further consideration, and I am sending you herewith a set of this material (as Part I of the attached compilation) in response to your request of September 23, 1919, in which you announced that the Committee on Ways and Means will soon undertake a study of the internal-revenue legislation.

This material is not in the form of recommendations by the department, as a decision has not yet been reached with respect to all of the suggestions; and, indeed, the department entertains serious doubt as to the advisability of the adoption of some of them.

When the department has had sufficient time to study, in the light of further administrative experience, all the suggestions which have been assembled and such additional suggestions as may occur to the officers of the department, I shall be

pleased to cooperate with the committee in the complete analysis of the law and the legislative requirements, as well as to detail to the committee the experts of the department who have had occasion to give personal study and attention to this matter.

In further compliance with your request of September 23, 1919, I have had a digest prepared of the decisions of the United States courts (arranged in accordance with the subject matter) under the internal-revenue acts from 1909 to 1919, both inclusive, which is inclosed herewith as Part II of the attached compilation.

Sincerely, yours,

CARTER GLASS.

Hon. JOSEPH W. FORDNEY,
Chairman Committee on Ways and Means, House of Representatives.

Appendix C

Citations of Tariff and Revenue Laws

Tariff Act of August 10, 1790, c. 39, 1 Stat. 180.

Tariff Act of May 2, 1792, c. 27, 1 Stat. 259.

Tariff Act of June 7, 1794, c. 54, 1 Stat. 390.

Tariff Act of March 3, 1797, c. 10, 1 Stat. 503.

Tariff Act of March 2, 1799, c. 22, 1 Stat. 627.

Tariff Act of May 13, 1800, c. 66, 2 Stat. 84.

Tariff Act of April 27, 1816, c. 107, 3 Stat. 310.

Tariff Act of May 22, 1824, c. 136, 4 Stat. 25.

Tariff Act of July 14, 1832, c. 227, 4 Stat. 583.

Tariff Act of August 30, 1842, c. 270, 5 Stat. 548.

Tariff Act of July 30, 1846, c. 74, 9 Stat. 42.

Tariff Act of March 2, 1861, c. 68, 12 Stat. 178.

Tariff Act of August 5, 1861, c. 45, 12 Stat. 292.

Tariff Act of December 24, 1861, c. 2, 12 Stat. 330.

War Revenue Act of 1862, July 1, 1862, c. 119, 12 Stat. 432.

Tariff Act of July 14, 1862, c. 163, 12 Stat. 543.

War Revenue Act of 1863 (March 3, 1863), c. 74, 12 Stat. 713.

Tariff Act of June 30, 1864, c. 171, 13 Stat. 202.

War Revenue Act of 1864 (June 30, 1864), c. 173, 13 Stat. 223.

War Revenue Act of 1866 (July 13, 1866), c. 184, 14 Stat. 98.

Combined Tariff and War Revenue Act of July 14, 1870, c. 255, 16 Stat. 256.

Tariff Act of June 6, 1872, c. 315, 17 Stat. 230.

Combination of War Revenue and Tariff Acts of March 3, 1883, c. 121, 22 Stat. 488.

Tariff Act of October 1, 1890, c. 1244, 26 Stat. 567.

Tariff Act of August 27, 1894, c. 349, 28 Stat. 509.

Tariff Act of July 24, 1897, c. 11, 30 Stat. 151.

Tariff Act of August 5, 1909, c. 6, 36 Stat. 11.

Tariff Act of July 26, 1911, c. 3, 37 Stat. 4.

Tariff Act of October 3, 1913, c. 16, 38 Stat. 114.

APPENDIX D

MALLEY, COLLECTOR, ETC., *v.* WALTER BAKER & CO., LIMITED

(Circuit Court of Appeals, First Circuit. May 17, 1922)

No. 1547
281 Fed. 41

Before BINGHAM, JOHNSON, and ANDERSON, *Circuit Judges.*

ANDERSON, *Circuit Judge:* The ultimate question in this case is whether all, or any, of the sweet chocolate manufactured and sold by the defendant in error, herein called the plaintiff, is subject to a 5 per cent. excise tax as candy, under the provisions of title 9, § 900, of the Revenue Act of 1918 (40 Stat. 1122), and the regulations made by the Commissioner of Internal Revenue under authority granted by this act.

Between February 24 and August 31, 1919, the plaintiff made sales of such chocolate aggregating $635,137.30, and under protest paid the 5 per cent. tax thereon, amounting, with interest to December 5, 1921, to $35,232.25. Suit to recover this tax came on for trial before the District Court with a jury. After much evidence on both sides had been taken, much of it having little or no bearing on the real issue, the court below found and ruled that the word "candy" had no special trade significance, different from its meaning in ordinary speech; that

the regulations of the Commissioner hereinafter set forth were invalid, as an attempt to extend the natural meaning of the language of the statute; that chocolate is an independent substance, used directly for food, and, though used in the manufacture of candy, is not candy, within the meaning of this tax act; and ordered a verdict for the plaintiff in the full amount claimed. The case comes here on writ of error.

The Revenue Act, supra, provides:

> There shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages for the prices so sold or leased: * * * (9) * * * Candy, 5 per centum.

The Commissioner of Internal Revenue, under the usual grant of power found in such statutes, promulgated regulations duly approved on May 1, 1919, by the Secretary of the Treasury. Article 22 of these regulations is as follows:

> *Candy.*—Candy, within the meaning of the act, includes *chocolate creams*, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, *chocolate-covered fruits*, and nuts, glacé or candied fruits and nuts, popcorn and other cereals and cereal products mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, candy cough drops and sweetened licorice not taxed as cough drops, *sweet chocolate and*

sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated. It does not, however, include cereal breakfast foods, cake and pastries, *nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.* If a manufacturer of glacé or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale thereof shall not be taxable. . Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer, and on which he has performed no further process of manufacture, the tax attaches only to such portion of the goods sold as have been manufactured by him. (Particularly pertinent words we have italicized.)

On May 10, 1919, the Commissioner ruled as follows:

> Sweet chocolate sold in parcels of such size and shape that it is commonly purchased and consumed as candy by the general public is taxable as candy, but sweet chocolate sold in large packages not as candy, but intended for further manufacturing purposes, is not taxable, provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes.

This ruling applies to sweet chocolate the exemption procedure applicable under the regulation, *supra*, to glacé and candied fruits.

Article 22 of the Regulations was revised in December, 1920, so that, while still covering affimatively "sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts," it by the addition of paragraph (b) excluded—

> sweet chocolate, glacé or candied fruits or nuts sold by the manufacturer used under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale that it will not be consumed in the form in which it is then sold.

The Commissioner, on January 25, 1921, in response to inquiry from the plaintiff, applied in detail the regulation to the plaintiff's business, as disclosed, and also ruled that—

> Upon the submission of evidence from the taxpayer, claims already rejected will be reopened and allowed in the amount representing tax paid on products herein held not taxable. Action on pending claims will be held in abeyance for further evidence.

It thus appears that, even after suit brought, the department was ready to entertain claims for taxes paid on sweet chocolate "sold for use in a form other than that in which it is sold by the manufacturer."

In the plaintiff's declaration it admitted in each of the five counts—referring to the certificate called for by the ruling of May 10, 1919, *supra*—that it had "no such certificates with respect to the chocolate upon the sale of which the tax was assessed,

and says that it was impossible for the purchaser to determine at the time of the sale of such chocolate whether it would be used for further manufacture or not." The record does not support this allegation of the impossibility of obtaining such certificates. No reason is apparent why in much, if not all, of the business such certificates could not have been obtained. But this was not made the exclusive method of distinguishing sweet chocolates intended for consumption, as such, from sweet chocolate intended as a food ingredient; any reasonable method of showing the determinative facts was available to this plaintiff.

At the trial it was agreed that—

> An analysis of the various brands of chocolate upon which the tax in suit was paid would show the following percentages of sugar:
>
> Between 60 and 65 per cent in Caracas chocolate.
>
> Between 50 and 55 per cent in German's chocolate.
>
> Between 50 and 55 per cent in Century and Vanilla chocolate.
>
> Between 30 and 35 per cent in Dot chocolate.
>
> Between 50 and 55 per cent in Eagle chocolate.

It was also agreed that an annexed schedule showed the sales of the various brands from February 24 to April 30, 1919. Sales for the months of May to August, inclusive, were shown only in the aggregate. Assuming, as we fairly may, that the schedule for February, March, and April is fairly typical of the whole period of about 7 months, it is clear that about half of the sales in question

consisted of the Caracas sweet chocolate, which contains from 60 to 65 per cent of sugar, and that the sales of the Dot chocolate, containing only from 30 to 35 per cent of sugar, were not more than about 10 per cent of the aggregate. All the other brands contained from 50 to 55 per cent of sugar. The necessary inference, therefore, is that the sweet chocolates sold, taken as a mass, were considerably more than half sugar.

It is matter of common knowledge, and the evidence and numerous exhibits also show, that this sweet chocolate is manufactured in cakes and bars, adapted for consumption as candy, packed in convenient cartons for sale as candy, advertised as "delicious for eating," or "excellent as a confection," and sold in large quantities over the candy counters, and consumed, at least in substantial part, in the form put out by the manufacturer for such consumption. Plainly, it is a mixture, about half and half, of sugar and chocolate, sometimes with flavoring material like vanilla, and in the form in which it is put up and marketed intended to cater to the same tastes and to appeal to the same class of consumers as are chocolate bonbons (barely distinguishable in composition) and other well-known forms of candy or confectionery. Sugar, "the appeal to the sweet tooth," is, of course, the basic ingredient in all candy. Sweet chocolate is a most toothsome form of sugar compound.

Not indented

Plaintiff's chief contention is that this sweet-chocolate product is, in its entirety, food, and not candy, within the fair meaning of the act. This view was adopted by the District Judge, who held it all exempt from the tax, denying the defendant's request to

submit to the jury an issue "as to the proportion of the total sales of each exhibit which was used for domestic or cooking purposes."

We think this was error. We construe the statute as the Commissioner construed it. While, as it is a tax statute, reasonable doubts must be resolved in favor of the taxpayer, we can see no such reasonable doubts as to the legislative intent to tax such products as sweet chocolate when manufactured, and sold for consumption in the form sold, and not for cooking or domestic purposes.

Not indented

Revenue Acts are not penal statutes. See *Cliquot's Champagne*, 3 Wall. 114, 145, where the court said:

> Revenue laws are not penal laws, in the sense that requires them to be construed with great strictness in favor of the defendant. They are rather to be regarded as remedial in their character, and intended to prevent fraud, suppress public wrong, and promote the public good. They should be so construed as to carry out the intention of the Legislature in passing them, and most effectually accomplish these objects.

To the same effect is the case of *United States* v. *Hodson*, 10 Wall. 395, 406, where Mr. Justice Swayne said:

> Revenue statutes are not to be regarded as penal, and therefore to be construed strictly. They are remedial in their character, and to be construed liberally, to carry out the purposes of their enactment.

The Circuit Court of Appeals for the Third Circuit, in *Carbon Steel* v. *Lewellyn*, 258 Fed. 533, 534, stated the rule as follows:

> In ascertaining the true construction of the law, and thus carrying out its purpose, this court must necessarily put itself in the position of Congress when it enacted the law, and from the circumstances and surroundings then existing, and the general purpose then in view, seek to ascertain, from what was meant to be done, how best to construe and apply what was done.

See also same case, 251 U. S. 501; *Worth Brothers* v. *Lederer*, 251 U. S. 507; *Baltimore Talking Board Co., Inc.*, v. *Miles* (D. C.), 273 Fed. 531; *Citizens Bank* v. *Parker*, 192 U. S. 73; *American Security Co.* v. *District of Columbia*, 224 U. S. 491.

Looking at the statute as a whole, it is clear that Congress, impelled by the expenses of the World War, intended to lay a pretty heavy tax on luxuries as distinguished from necessaries. Candy, manufactured and consumed in tremendous quantities, because of the well-known and extraordinary American appetite for sweets, was regarded as a luxury.

But this sweet-chocolate product consists, as already noted, more than half of sugar. Sugar is far more important as a food element than is chocolate. Sugar is admittedly the basic ingredient of candy. To hold, as the court below held, that sweet chocolate is not candy, because chocolate is also food, falls logically little short of holding that candy is not candy because sugar is also food. Nuts and practically all the other ingredients of candy, except perhaps some of the flavoring materials, are also food. We can not agree with the court below that sweet chocolate is not candy simply because made up about half and half of chocolate and sugar, each of which is a food. Some other test must be

found. Sugar compounds are admittedly candy, when manufactured, advertised, sold, and consumed as candy, and not as a food ingredient. The distinction turns, not so much on the composition of the article, as on the way or form in which it is sold, and upon the use made of it by its purchasers.

We think the court below erred in holding invalid this distinction made by the Commissioner as to sweet chocolate. The plaintiff's contention, in effect adopted by the District Court, that the tax was on the product—sweet chocolate—and applicable to *all* or to *none* of it, is untenable. The use or destination of the product may well have been made by Congress the basis of classification for taxing purposes. Coal and diamonds are chemically much alike; practically and for tax purposes they are radically different. We think the test applied by the Commissioner was consonant with the statute. Apart from the weight given department rulings and regulations in such cases, our construction of the act conforms to that of the Commissioner; it seems to us fairly plain.

But it is elementary that, if ambiguity is found in a statute, or when it is necessary to determine a fact upon which the operation of a statute is made to depend, the regulations made by the department charged with the administration of the act are to be given great, sometimes practically controlling, weight. See *Edwards, Lessee,* v. *Darby,* 12 Wheat. 206, 212; *Houghton* v. *Payne,* 194 U. S. 88, 96; *Komada* v. *United States,* 215 U. S. 392; *Jacobs* v. *Prichard,* 223 U. S. 200, 214; *Houston* v. *St. Louis Independent Packing Co.,* 249 U. S. 479; *Noble* v. *Union River Logging R. R. Co.,* 147 U. S. 165; *Coopersville Co-op. Creamery Co.* v. *Lemon,* 163 Fed.

145; *United States* v. *Healey*, 160 U. S. 136, 141; *Robertson* v. *Downing*, 127 U. S. 607, 613; *Cf. Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349, where the court, by Mr. Justice Clarke, said:

> It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of which is confided to such department, has the force and effect of law, if it be not in conflict with express statutory provisions. (Citing *United States* v. *Grimaud*, 220 U. S. 506; *United States* v. *Birdsall*, 233 U. S. 233, 251; *United States* v. *Smull*, 236 U. S. 405, 409, 411; *United States* v. *Morehead*, 243 U. S. 607.)

It comes to this: Congress intended that various compounds of sugar and other ingredients, practically all of which are also food ingredients, should, when compounded, sold, and consumed as candy, a luxury, be subjected to this tax. The distinction undertaken to be made by the department that sweet chocolate should be taxed when put up and sold in such form as to indicate that it was to be consumed as candy is consumed, and not taxed when it was obvious from the packing or other circumstances surrounding the transaction that it was to be merely an ingredient for further manufacture is a sound distinction. At any rate, unless this distinction is made, it is difficult to see how candy can be taxed at all; for, as already stated, candy is in its main characteristics sugar compounds, intended for luxury, taste-gratifying, consumption. When somewhat less than half of a toothsome sweet is chocolate—also a common ingredient of candy com-

pounds—the resultant is not transmuted into food, within the fair meaning of this tax statute, if the compound is sold and consumed as confectionery or candy.

The eighteenth assignment of error brings before us the refusal of the court below to submit to the jury the question of what proportion of the sweet chocolate in question was used for cooking or domestic purposes. This assignment must be sustained. The burden of proof is on the plaintiff to show that the taxes collected were illegal or the assessments excessive. *Anderson* v. *Farmers' Loan & Trust Co.*, 241 Fed. 322; *New York Life Ins. Co.* v. *Anderson* (C. C. A.), 263 Fed. 527, 530; *Germantown Trust Co.* v. *Lederer* (C. C. A.), 263 Fed. 672; *Bailey* v. *Railroad Co.*, 22 Wall. 604, 638; *Black, Fed. Cases*, § 547; *Schafer* v. *Craft, Collector* (D. C.), 144 Fed. 907, 909; *South Pacific* v. *Lowe, Collector* (D. C.), 238 Fed. 847, 849; *Cohen* v. *Lowe, Collector* (D. C.), 234 Fed. 474, 476.

The plaintiff is not entitled to recover more than the amount that it can show it paid as a tax on such portions of the product in question as were not sold and used as candy within the meaning of the Department's regulation.

The judgment of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, and the plaintiff in error recovers costs in this court.

U. S. GOVERNMENT PRINTING OFFICE: 1931

FILE COPY

Nos. 426—441.

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

B. D. McCaughn, Collector, v. Hershey Chocolate Co.
Est. E. Lederer, Collector, v. Hershey Chocolate Co.
Est. B. F. Davis, Collector, v. Hershey Chocolate Co.
Est. E. Lederer, Collector, v. Hershey Chocolate Co.
B. D. McCaughn, Collector, v. Hershey Chocolate Co.
Est. B. F. Davis, Collector, v. Hershey Chocolate Co.
Est. B. F. Davis, Collector, v. Klein Chocolate Co.
Est. E. Lederer, Collector, v. Klein Chocolate Co.
Est. E. Lederer, Collector, v. Klein Chocolate Co.
B. D. McCaughn, Collector, v. Klein Chocolate Co.
Est. E. Lederer, Collector, v. Wilbur-Suchard Chocolate Co.
Est. E. Lederer, Collector, v. Wilbur-Suchard Chocolate Co.
B. D. McCaughn, Collector, v. Wilbur-Suchard Chocolate Co.
Est. B. F. Davis, Collector, v. York Chocolate Co.
Est. E. Lederer, Collector, v. York Chocolate Co.
B. D. McCaughn, Collector, v. York Chocolate Co.

IN RE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN E. SNYDER,
Hershey, Pa.
F. LYMAN WINDOLPH,
Lancaster, Pa.
C. J. HEPBURN,
Philadelphia, Pa.
S. V. HOSTERMAN,
Lancaster, Pa.
D. F. MAGEE,
Lancaster, Pa.
A. ALLEN WOODRUFF,
Philadelphia, Pa.
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Nos. 426—441

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1930.

B. D. McCaughn, Collector, v. Hershey Chocolate Co.
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B. D. McCaughn, Collector, v. Hershey Chocolate Co.
Est. B. F. Davis, Collector, v. Hershey Chocolate Co.
Est. B. F. Davis, Collector, v. Klein Chocolate Co.
Est. E. Lederer, Collector, v. Klein Chocolate Co.
Est. E. Lederer, Collector, v. Klein Chocolate Co.
B. D. McCaughn, Collector, v. Klein Chocolate Co.
Est. E. Lederer, Collector, v. Wilbur-Suchard Chocolate Co.
Est. E. Lederer, Collector, v. Wilbur-Suchard Chocolate Co.
B. D. McCaughn, Collector, v. Wilbur-Suchard Chocolate Co.
Est. B. F. Davis, Collector, v. York Chocolate Co.
Est. E. Lederer, Collector, v. York Chocolate Co.
B. D. McCaughn, Collector, v. York Chocolate Co.

IN RE PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS CONTRA PETITION FOR WRITS OF CERTIORARI.

JURISDICTION.

The Respondents, while conceding the jurisdiction of this Court to review the questions decided by the Circuit Court of Appeals for the Third Circuit on writs of *certiorari* filed by the Government, assert that for the reasons hereafter set forth the petitions should be denied because there is no such conflict with any decision of other Circuit Courts of Appeal and no such continuing question of general public interest as the Government asserts; and that the questions which control the decision of these cases have been heretofore adjudicated conclusively by the decisions of this Court.

QUESTION PRESENTED.

The controlling question is whether the Congress of the United States by the provisions of Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 imposing an excise tax on "candy" intended thereby to impose this tax upon sweet chocolate and sweet milk chocolate.

ARGUMENT.

The excise taxes imposed by the Revenue Act of 1918 and the Revenue Act of 1921 have been repealed, and therefore the decision of the question involved in these cases controls a very limited number of cases, most of which are covered by the petitions under consideration.

The decision of the Circuit Court of Appeals in these cases is not in conflict with either Malley *v.* Walter Baker & Co., 281 Fed. 41, nor Cracker Jack Co. *v.* United States, 67 C. Cls. 89, 280 U. S. 579, for the reason that the controlling facts which are in these records, now before the Court, are different from the facts which controlled those decisions, relied upon by the Petitioner.

Not only is there no conflict in the decision of the Cir-

cuit Court of Appeals for the Third Circuit in these cases, on questions of law, with decisions of other Circuit Courts of Appeal, but it is made clear by a reading of the opinion of Judge Avis for the Circuit Court of Appeals in these cases that the judgments are controlled by the applicable decisions of this Court cited in that opinion.

The question which was decided in the judgments complained of in these cases was whether an excise tax imposed by Acts of Congress upon "candy" *eo nomine* may be lawfully assessed by the Treasury Department upon sweet chocolate and sweet milk chocolate.

The Government asserts that it is entitled to retain the taxes collected from these Respondents because the Commissioner of Internal Revenue had power to extend by classifying regulations the tax imposed by the statutes upon "candy" to sweet chocolate and sweet milk chocolate, even though these products were omitted by Congress from the articles upon which the excise taxes were imposed.

The decisions of this Court seem to deny to the Treasury Department of the United States such power of levying taxes, and these have been followed by the learned Judges of the Court below in reaching the conclusions which the Government attacks in the pending petitions.

Judge Avis, speaking for the Court (Record, pp. 150, 152, 153) says:

> "We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.
>
> "In all of the tariff and internal revenue acts of Congress from 1792 to 1913, candy generally called 'sugar candy,' and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and

taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

"The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate, and, when it was asserted that chocolate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the members of Congress.

"The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in Congressional enactments or by executive regulation, included in the term 'candy,' is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

"The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate *eo nomine*, notwithstanding the fact that the regulations of the Commissioner, classifying both as 'candy,' under the 1918 act, and that the District Court decision in Massachusetts holding that they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

"It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts."

* * * * * * *

"In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the Committee a definition of the word 'candy,' which included sweet chocolate

and sweet milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases."

* * * * * * *

"In both the revenue acts of 1918 and 1921, the authority of the Commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:

"'That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act.'

"It will be noted in this statute, that it provides for 'rules and regulations' which shall be 'for the enforcement of the provisions of this act.'

"The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly, the Commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute."

* * * * * * *

"Taking into consideration, the reading of the statute; the prior attitude of Congress with relation to imposition of taxes on chocolate; and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining 'candy,' afterward promulgated by the Commissioner

and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant-appellee.

"We, therefore, hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the Commissioner, approved by the Secretary."

Among the decisions of this Court relied upon by the Circuit Court of Appeals which seem to settle the law so conclusively that no further argument by the Government should disturb it, are—

DeForest, *et al.*, *v.* Lawrence, 54 U. S. 274;
Reiche *v.* Smythe, 80 U. S. 162;
Arthur v. Stephani, 96 U. S. 125.

The opinion of the Circuit Court of Appeals in these cases now before this Court is printed in full in the appendix hereto for the convenience of the Court, and the Respondents confidently submit that a reading of it will convince the learned Justices of this Court that there is no new question raised by the petition in these cases, and that the judgment rendered in favor of the Respondents so clearly accords with the applicable decisions of this Court that the writs of *certiorari* in these cases should be denied.

JOHN E. SNYDER,
F. LYMAN WINDOLPH,
C. J. HEPBURN,
S. V. HOSTERMAN,
D. F. MAGEE,
A. ALLEN WOODRUFF,
WM. CLARKE MASON,
Counsel for the Several Respondents.

APPENDIX.

(See Record, pp. 147-153.)

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS.
FOR THE THIRD CIRCUIT.

HERSHEY CHOCOLATE CO.,
Appellant,
v.
B. D. McCAUGHN, COLLECTOR,
Appellee.
No. 4157.
October
Term, 1929.

HERSHEY CHOCOLATE CO.,
Appellant.
v.
EST. E. LEDERER, COLLECTOR,
Appellee.
No. 4158.
October
Term, 1929.

HERSHEY CHOCOLATE CO.,
Appellant,
v.
EST. B. F. DAVIS, COLLECTOR,
Appellee.
No. 4159.
October
Term, 1929.

HERSHEY CHOCOLATE CO.,
Appellant,
EST. E. LEDERER, COLLECTOR,
Appellee.
No. 4160.
October
Term, 1929.

HERSHEY CHOCOLATE CO.,
Appellant,
v.
B. D. McCAUGHN, COLLECTOR,
Appellee.
No. 4161.
October
Term, 1929.

HERSHEY CHOCOLATE CO.,
Appellant,
v.
EST. B. F. DAVIS, COLLECTOR,
Appellee.
No. 4162. October Term, 1929.

KLEIN CHOCOLATE CO.,
Appellant,
v.
EST. B. F. DAVIS, COLLECTOR,
Appellee.
No. 4163. October Term, 1929.

KLEIN CHOCOLATE CO.,
Appellant,
v.
EST. E. LEDERER, COLLECTOR,
Appellee.
No. 4164. October Term, 1929.

KLEIN CHOCOLATE CO.,
Appellant,
v.
EST. E. LEDERER, COLLECTOR,
Appellee.
No. 4165. October Term, 1929.

KLEIN CHOCOLATE CO.,
Appellant,
v.
B. D. McCAUGHN, COLLECTOR,
Appellee.
No. 4166. October Term, 1929.

WILBUR-SUCHARD CHOCOLATE CO.,
Appellant,
v.
EST. E. LEDERER, COLLECTOR,
Appellee.
No. 4167. October Term, 1929.

WILBUR-SUCHARD CHOCOLATE CO.,
Appellant,
v.
EST. E. LEDERER, COLLECTOR,
Appellee.
No. 4168. October Term, 1929.

WILBUR-SUCHARD CHOCOLATE CO.,
Appellant,
v.
B. D. McCAUGHN, COLLECTOR,
Appellee.
No. 4169. October Term, 1929.

YORK CHOCOLATE CO.,
Appellant,
v.
EST. B. F. DAVIS, COLLECTOR,
Appellee.
No. 4170. October Term, 1929.

YORK CHOCOLATE CO.,
Appellant,
v.
EST. E. LEDERER, COLLECTOR,
Appellee.
No. 4171. October Term, 1929.

YORK CHOCOLATE CO.,
Appellant,
v.
B. D. McCAUGHN COLLECTOR,
Appellee.
No. 4172. October Term, 1929.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed June 6, 1930.)

Before WOOLLEY and DAVIS, *Circuit Judges,* and AVIS, *District Judge.*

AVIS, *District Judge:*

These cases were all tried in the District Court at one time; one opinion was rendered in all of the cases, and

although brought into this court by separate appeals, were heard in one argument.

Appellants are all manufacturers of sweet chocolate and sweet milk chocolate, the product of the cacao bean, and made certain payments of amounts alleged to be due the Government as taxes, under the revenue acts of 1918 and 1921 and the regulations of the Internal Revenue Commissioner. All of said payments were made "under protest," and later, at different and sundry times, appellants filed claims for refund with the Collectors of Internal Revenue, in the various districts in which payments had been made, for transmission to the Commissioner of Internal Revenue. All of said claims for refund were rejected by the Commissioner, and the suits followed.

The district court, sitting without a jury, heard the testimony, held that the tax was lawfully imposed, and caused judgment to be entered in favor of the defendants, and from these judgments, all of the cases are brought by appeal to this court.

Twenty-nine assignments of error were filed, and relied upon by the appellants, but as a matter of fact they are all merged in one question to be decided, *i. e.*, Does the word "candy" in the Revenue Act of 1918 (Title IX, sec. 900 (9)) and the Revenue Act of 1921 (Title IX, sec. 900 (6)), include sweet chocolate and/or sweet milk chocolate?

The portion of the act of 1918 under which the tax was assessed and paid, reads as follows:

> "That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased—
>
> * * * * * * *
>
> "(9) Candy, 5 per centum; * * *" (40 Stat. c. 18, pp. 1057, 1122).

The act of 1921 reads exactly the same, with the exception that the percentage of tax is placed at 3 per cent. instead of 5.

The decision of this question rests upon—

(1) The definition of the word "candy."

(2) Whether or not sweet chocolate and sweet milk chocolate is candy in accordance with its commonly accepted use?

(3) Did Congress intend to include sweet chocolate and sweet milk chocolate under the term "candy" in the revenue acts?

(4) Was the regulation of the Commissioner of Internal Revenue conclusive, and did he have authority, under the acts, to include sweet chocolate and sweet milk chocolate under the term "candy"?

(5) Do the classifications promulgated by the Secretary of Agriculture, under the Pure Food Laws, in any way affect the question of the legality of the tax imposed?

Under the evidence in this case, it is rather difficult to define the word "candy." There is nothing in the testimony, outside of the technical definitions, and possibly the classifications promulgated by the Secretary of Agriculture, to assist the court in arriving at a conclusion as to the inclusiveness of the word. Webster defines candy as follows:

> "A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruit, nuts, etc. Also, any sweetmeat made of, or coated with, a preparation of sugar or molasses; a piece of confectionery."

The evolution of the use of sweetmeats in modern times may have, and probably has, extended the meaning of the word to other articles than those strictly included in the definition given by Webster.

Counsel for appellants argue that the classification by the Secretary of Agriculture, under the Pure Food Laws and under authority given by Congress, indicates that sweet chocolate and sweet milk chocolate are not included within the designation of "candy."

It is true that in this classification, candy and chocolate, both "sweet" and "sweet milk," are under separate heads, and it is apparent that for purposes of the statute under which this classification was made, it was undoubtedly treated under separate headings, but this may not be conclusive in construing the revenue acts under which this suit was brought. Whether or not "candy" in its technical sense, includes sweet chocolate and/or sweet milk chocolate, we do not deem it necessary to decide, in view of our conclusions, hereinafter set forth, with relation to the intention of Congress when the revenue acts of 1918 and 1921 were enacted.

The court below said, with relation to the word "candy" as it applies to sweet chocolate and sweet milk chocolate:

> "It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhesitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one."

This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact. It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion. While some people might look upon it as candy, we feel that many would call it a food, and in the absence of anything in the record tending to show that this is the popular opinion, we cannot sustain the judgment of the court on this theory.

We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the revenue acts of 1918 and 1921.

In all of the tariff and internal revenue acts of Congress from 1792 to 1913, candy, generally called "sugar candy," and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.

The revenue act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate, and, when it was asserted that chocolate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the members of Congress.

The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in Congressional enactments or by executive regulation, included in the term "candy," is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 revenue act.

The act of 1921 contains no reference to sweet chocolate or sweet milk chocolate *eo nomine*, notwithstanding the fact that the regulations of the Commissioner, classifying both as "candy," under the 1918 act, and that the District Court decision in Massachusetts holding they were not taxable; was before the committee and Congress at the time of the consideration of the bill.

It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of *De Forest*, et al., v. *Lawrence*, 54 U. S. 273, 281, said:

> "And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally

speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the customhouse.

"It is but fair to presume, after having been treated by the law-makers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different."

In *Reiche* v. *Smythe*, 80 U. S. 162, 165, it was held:

"Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in pari materia, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention."

The effect of the distinction recognized by Congress is very aptly referred to in the case of *Arthur* v. *Stephani*, 96 U. S. 125, 127, 128, wherein the court among other things, said:

> "Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name.
>
> * * * * * * *
>
> "Contemporaneously and side by side, all the way down, the statutes provide for different rates of duty on the varieties of sugar and on confectionery, as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties.
>
> * * * * * * *
>
> "It is quite evident that Congress has at all times intended to preserve the distinction between these articles, and that the circuit judge decided correctly when he held that chocolate, although in the form and of the character described, was not dutiable as 'confectionery' under the act of 1864."

This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case *sub judice*.

This is further demonstrated by an examination of the record of deliberations and discussions in the committees; and also upon the floor of the Senate, when the 1921 act was under consideration, which are corroborative of the facts upon which our conclusions are based.

An examination of the evidence offered in this regard, discloses that a Mr. Fuller, apparently a candy manufacturer, called the attention of the Senate committee to a decision in the United States court, District of Massachusetts, holding that chocolate was not candy, and not taxable under the 1918 act; and that some provision should be made in the

1921 act to put chocolate upon the same basis as candy, either by removing the tax from candy, or, inferentially, to impose a similar tax on chocolate. Similar representations were made to the House Ways and Means Committee; and the question was discussed quite fully on the floor of the Senate; the understanding, apparently at that time, being that the word "candy," in the revenue act of 1918, did not include sweet chocolate or sweet milk chocolate.

In addition to this, while the House Ways and Means Committee was considering the bill which culminated in the revenue act of 1921, the Secretary of the Treasury submitted to the Committee a definition of the word "candy," which included sweet chocolate and sweet milk chocolate, but with the suggestion that the statement of this definition might be incorporated in the law, which was not included in the act when finally passed. This definition, so submitted and not included, was in the same language as contained in the classification subsequently promulgated by the Secretary of the Treasury, under the right conferred by the statute to make regulations, and under which a portion of the tax was levied and collected in these cases.

The deliberations of the committees and the facts produced before them when considering the bill, appear to be legal evidence and should be given its due weight. *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464; *Binns* v. *United States*, 194 U. S. 486, 495.

In spite of the knowledge of the representatives and senators in Congress, no definite tax was levied on sweet chocolate or sweet milk chocolate; and from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the revenue acts of 1918 or 1921.

In both the revenue acts of 1918 and 1921, the authority of the Commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:

> "That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act."

It will be noted in this statute, that it provides for "rules and regulations" which shall be "for the enforcement of the provisions of this act."

The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly, the Commissioner and/or the Secretary have no authority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

In the case of *Morrill* v. *Jones*, 106 U. S. 466, 467, Chief Justice Waite said:

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

See, also, *United States* v. *United Verde Copper Co.*, 196 U. S. 207.

A regulation of an executive department construing a statute is given great weight, and is strongly-persuasive, and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. See *Burk-Waggoner Oil Assn.* v. *Hopkins* (N. D. Tex.), 296 F. 492, and cases cited.

Taking into consideration, the reading of the statute; the prior attitude of Congress with relation to imposition of taxes on chocolate; and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining "candy," afterward promulgated by the Commissioner and the Secretary, was submitted to the committee considering the bill, we are

convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant-appellee.

We, therefore, hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the Commissioner, approved by the Secretary.

It is contended by the appellants that the classifications of the Secretary of Agriculture, promulgated under the Pure Food laws, conclusively define chocolate as a product which could not be included under the term "candy," which is also classified in these regulations. These classifications were made under laws relating to pure foods, and, while they might have some effect upon the establishment of the general definition of the respective products, we cannot see that they are in any way controlling on the main questions at issue in these cases.

The case of *Malley* v. *Walter Baker & Co.* (C. C. A. 1), 281 F. 41, is strongly relied upon by the appellee, it being the contention that this case is controlling as establishing a precedent which in effect should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley case there was no decision upon the question of what Congress intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress, or the proceedings of the committees of Congress in consideration of the bills, was submitted to the court considering that case. We are not able to follow that court in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word "candy," or in its conclusion that the Commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress.

The judgments of the District Court are reversed and the cases remanded for new trials or other lawful proceedings in conformity with this opinion.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

Nos. 426–441.

B. D. McCaughn, Collector, v. Hershey Chocolate Co., No. 426.
Est. E. Lederer, Collector, v. Hershey Chocolate Co., No. 427.
Est. B. F. Davis, Collector, v. Hershey Chocolate Co., No. 428.
Est. E. Lederer, Collector, v. Hershey Chocolate Co., No. 429.
B. D. McCaughn, Collector, v. Hershey Chocolate Co., No. 430.
Est. B. F. Davis, Collector, v. Hershey Chocolate Co., No. 431.

Est. B. F. Davis, Collector, v. Klein Chocolate Co., No. 432.
Est. E. Lederer, Collector, v. Klein Chocolate Co., No. 433.
Est. E. Lederer, Collector, v. Klein Chocolate Co., No. 434.
B. D. McCaughn, Collector, v. Klein Chocolate Co., No. 435.

Est. E. Lederer, Collector, v. Wilbur-Suchard Chocolate Co., No. 436.
Est. E. Lederer, Collector, v. Wilbur-Suchard Chocolate Co., No. 437.
B. D. McCaughn, Collector, v. Wilbur Suchard Chocolate Co., No. 438.

Est. B. F. Davis, Collector, v. York Chocolate Co., No. 439.
Est. E. Lederer, Collector, v. York Chocolate Co., No. 440.
B. D. McCaughn, Collector, v. York Chocolate Co., No. 441.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

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ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS.

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OPINION BELOW.

The opinion of the Circuit Court of Appeals filed June 6, 1930, is reported in 42 Fed. (2nd) 408, and in the Record, pp. 92-98.*

JURISDICTION.

The statement of jurisdiction is set forth in Brief of Petitioner.

QUESTION PRESENTED.

The controlling question is whether the Congress of the United States by the provisions of Section 900 of the Revenue Act of 1918 and Section 900 of the Revenue Act of 1921 imposing an excise tax on "candy" intended thereby to impose this tax upon sweet chocolate and sweet milk chocolate.

STATUTES AND REGULATIONS INVOLVED.

The Statutes involved are printed in Appendix, pp. 59 to 63. The Regulations involved are printed in the Appendix, pp. 82 to 85.

STATEMENT OF CASE.

These cases were brought by four chocolate manufacturers to recover the sums set forth in the several statements of claim representing taxes paid under protest and claimed to have been unlawfully collected by the several original defendants, as Collectors of Internal Revenue.

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* Throughout this Brief the pages referred to are those in the Record in the Hershey cases, viz., Nos. 426 to 431, inclusive.

The taxes were assessed and collected by authority alleged to have been given by the Revenue Acts of 1918 and 1921, Title IX, Section 900, sub-divisions 9 and 6, respectively.*

The taxes were assessed pursuant to Regulations issued by the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, and pursuant to the office opinions of the Commissioner, purporting to define candy as used in the Acts, but in reality merely listing a number of products to be classified as candy for purposes of taxation, with the limitation as to some of them that they were to be taxable only if sold in packages of the sizes given or used for the purposes named.

Sweet chocolate and sweet milk chocolate were included within this classification by the Department. Congress did not include either sweet chocolate or sweet milk chocolate as taxable products *eo nomine* in any section of the Act of 1918 or the Act of 1921.

The pleadings in these cases together with the admitted facts have resulted in establishing for the record as undisputed all of the jurisdictional facts to justify a recovery on the part of the respondents.

The differences between the parties, which constitute a single issue, may be said to result solely from the attempt of the Government to include within the meaning of the word candy used in the Acts of 1918 and 1921 the sweet chocolate and sweet milk chocolate on which these taxes were assessed.

The respondents assert that this attempt upon the part of the Treasury was without power granted by Congress and was in direct conflict with the provisions of these statutes and with a long line of decisions in the Federal courts.

The petitioner asserts that sweet chocolate and sweet milk chocolate became candy under the Acts of 1918 and 1921 because the Commissioner of Internal Revenue had the power to make them candy for purposes of taxation.

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* See Appendix to this Brief, pp. 59 to 63, where the entire Section 900 of each Act is set up in parallel columns.

SUMMARY.

Points for Argument.

1. Candy and chocolate are essentially different products.

2. The consistent distinction between chocolate and candy to be found in internal revenue acts and tariff acts from 1792 to the present time is controlling, in the absence of any expression by Congress of an intention to the contrary.

3. The structure and legislative history of the subdivision providing for a tax on candy in Section 900, Title IX, of the Acts of 1918 and 1921 indicate that Congress did not intend to impose a tax on chocolate.

4. Article 22 of Treasury Regulations 47 under the Act of 1918, and Article 19 of Treasury Regulations 47 under the Act of 1921 are both invalid.

ARGUMENT.

1. Candy and chocolate are essentially different products.

For the convenience of the Court, counsel for the respondents have appended to this brief (pages 86 to 88), a transcript of the definitions of "candy" and "chocolate" appearing in various accredited dictionaries. The purport of these definitions is exceedingly plain. "Candy," to quote Webster's New International Dictionary (1927), is "a more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape." "Chocolate," on the other hand, is, according to the same authority, "a preparation composed of the roasted seeds of the cacao ground and mixed with other ingredients, usually sugar, and cinnamon or vanilla." As the respondents view the matter, chocolate is no more candy than a score of other substances which might readily be named and which are sometimes used as ingredients of candy.

WORDS AND PHRASES, a recognized law dictionary shows that "candy" (see Volume I, 1914, 2nd Series, page 558; Vol. II *id.* page 589; Volume IV *id.* pages 664, 772) and "chocolate" (see Volume II, 1904, 1st Series, page 1144) have been defined separately by the Courts.

In addition to dictionary definitions these words have been scientifically defined by the Secretary of Agriculture in connection with establishing standards of purity for food products, pursuant to authority given by the Acts of Congress of June 3, 1902, 32 Stat. L. 286, 296, and March 3, 1903, 32 Stat. L. 1147, 1158. It was not contended in the Court below, and it is not contended here, that these definitions are binding in the case at bar. They supply, however, a technical or scientific definition of candy and of chocolate, which it may be assumed that Congress had knowledge of prior to the passage of the statutes in question, as these defintions were made pursuant to the express direction of Congress. Moreover, they were made, by the statutory authority above recited, expressly "for the guidance of the officials of the various states *and of the courts of justice.*" (Acts of Congress of June 3, 1902, 32 Stat. L. 286, and March 3, 1903, 32 Stat. L. 1147.) Finally, it is averred in paragraph 11 of the plaintiff's statement of claim—which was duly offered and admitted in evidence because not denied in the affidavit of defense and which appears on page 5 of the Record—that "there is no authority vested by Act of Congress or otherwise in the Secretary of the Treasury or the Commissioner of Internal Revenue to establish definitions, * * * of food products including Cacao products for the United States of America," and that "the definitions * * * by the Secretary of Agriculture * * * are legal definitions of food products for the United States of America."

But the Secretary of Agriculture was authorized to do more, and actually did do more, than merely to propound definitions. *He was authorized to classify, and in collaboration with the Association of Official Agricultural Chemists of the United States, and other experts, did classify, a variety of food products, including candy and chocolate.*

These official classifications show candy classified under Section C, "Sugar and Related Substances," and defined as follows (see Second Column Plaintiff's Exhibit 13, reproduced on pages 64 to 68 of this Brief):—

> "*Candy* is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug" (p. 68, this Brief);

and sweet chocolate and sweet milk chocolate classified under Section E, "Tea, Coffee and Cacao Products," and defined as follows (see Third Column, pages 64 to 68, of this Brief):—

> "*Chocolate* is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. *Sweet chocolate* is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices or other flavoring materials. *Sweet milk chocolate* is sweet chocolate which contains not less than twelve per cent. (12%) of whole milk solids in the finished product" (p. 68 of this Brief).

The official documents showing these classifications and definitions will be judicially noticed in cases tried in the Federal Courts (**Thornton v. United States, 271 U. S. 414, 420**), but in the case at bar it is not necessary that the Court should take judicial notice of them because, as has previously been pointed out, they are made a part of the record by the pleadings and offers in evidence. See the summary or table constituting plaintiff's Exhibit 13, a copy of which is appended to this Brief (p. 64). *It should be noted particularly that "the definitions are so framed as*

to exclude from the articles defined substances not included in the definition." Certainly, therefore, chocolate was not candy in the technical or scientific sense at the time the Revenue Acts of 1918 and 1921 were enacted, or at the time the taxes here sought to be recovered were assessed and collected.

When Congress speaks of *"candied* popcorn" and *"candied* fruit," etc., as it does for instance in the Tariff Acts of 1911, 1913 and 1922 (see Plaintiffs' Exhibit No. 12, pp. 79, 80 and 81 of this Brief) and elsewhere, it is obvious that reference is made to popcorn or fruits covered or preserved with a preparation having as its base boiled sugar. If the same popcorn or fruit were covered with sweet chocolate or sweet milk chocolate it would never be known or called *"candied"* but always as *"chocolate covered."* This distinction is recognized by the Secretary of the Treasury, himself, in his various Regulations (see bottom of page 82 of this Brief) wherein he repeatedly lists *"chocolate covered* fruits and nuts" as one thing and *"candied* fruits and nuts" as something entirely different.

The fact that the lexicographers and the authorized departments of the Federal Government and Congress itself have so consistently expressed the difference between sweet chocolate and sweet milk chocolate on the one hand and candy on the other is merely a reflection of the fact that they are different commodities and can never be the same.

Reference has been made to the works of reputable lexicographers as showing the everyday household use of the words "chocolate" and "candy" and to the technical or scientific definitions of these words framed by the Secretary of Agriculture. All of these definitions are entirely harmonious, and all of them point to the same obvious distinction. *There is, moreover, no evidence in the case, either oral or written, at variance with this distinction.*

The testimony of the three witnesses called by the Government need not be discussed at length. Louis Newhoff, a wholesale confectioner, testified that he bought sweet chocolate and sweet milk chocolate from the plaintiff and sold it to his customers, including jobbers in groceries and

drugs, but that he also bought and sold salted peanuts, candied fruits, raisins and small cakes, and, as a side line, small toys and balloons (Record, pages 52-55). This testimony clearly shows that "chocolate" was handled as a product well known in the trade, and that when a purchaser asked for "chocolate" he was given "chocolate," and when "candy" was asked for chocolate was not given. Albert Schneider, a foreman for S. S. Kresge Company, testified that the plaintiff's milk chocolate is carried in what is known as the candy department of his employer's chain of stores, but that chewing gum, raisins, peanuts and glass novelties filled with candy are carried in the same department (Record, pages 56-58). Israel Margolis, both a wholesaler and retailer of confectionery, testified that he handled the plaintiff's products and sold them as chocolate, but that he also handled tobacco, ice cream supplies, raisins, cough drops, mint, chewing gum, salted nuts, balloons, rubber balls, clay pipes and trinkets (Record, pages 59-61).

In **United States v. Cattus, 167 Fed. 532,** the Circuit Court of Appeals for the Second Circuit held that artificial shamrocks made of silk and metal, used by the Irish of all ages as national emblems on St. Patrick's Day, were not "toys" dutiable under paragraph 418 of Schedule N of the Tariff Act of 1897, carrying a 35% duty, as claimed by the importer, but were in truth "artificial or ornamental * * * flowers * * * of whatever material composed," carrying a 50% duty. In reaching this conclusion the Court said (page 533):—

> "These articles have no established commercial designation as toys. They are sold as shamrocks; and though they are usually to be obtained in toy shops, *not everything in a toy shop is a toy**—*e. g.*, baseballs and bats, firecrackers, bows and arrows, checker boards, playing cards, etc."

The learned Court of Appeals in finding for the respondents, refused to accept certain conclusions of the trial

*Italics in quotations throughout this Brief are ours, unless otherwise noted.

Judge not supported by evidence and commented upon these conclusions as follows (R. 93, 94):—

"Whether or not 'candy' in its technical sense, includes sweet chocolate and/or sweet milk chocolate, we do not deem it necessary to decide, in view of our conclusions, hereinafter set forth, with relation to the intention of Congress when the Revenue Acts of 1918 and 1921 were enacted.

"The court below said, with relation to the word 'candy' as it applies to sweet chocolate and sweet milk chocolate:

"'It is a word of every day household use and, taken in its ordinary popular sense, I think that it includes the plaintiff's products in the forms in which this tax has been collected upon them. Probably nine people out of ten would say unhestitatingly that it did, and to my mind a definition which narrows it so as to exclude the plaintiff's product is not a natural one.'

"This statement of the court, which is made without any testimony to sustain it, and upon which the court very naturally relied in forming its opinion, it seems to us, may be without foundation in fact. It is entirely a matter of personal opinion, and we are not so sure that an actual investigation would sustain the conclusion. While some people might look upon it as candy, we feel that many would call it a food, and, in the absence of anything in the record tending to show that this is the popular opinion, we cannot sustain the judgment of the court on this theory.

"We are satisfied that the decision in this case rests primarily upon the action and intent of Congress in the enactment of the laws under which the tax was levied and collected, and this intent must necessarily be gathered from the prior laws in which different articles are classified for taxing purposes, and the proceedings preliminary to the enactment of the Revenue Acts of 1918 and 1921."

2. The consistent distinction between chocolate and candy to be found in internal revenue acts and tariff acts from 1792 to the present time is controlling in the case at bar, in the absence of any expression by Congress of an intention to the contrary.

Plaintiff's Exhibit 12, which was identified on page 46 of the Record and a copy of which is appended to this Brief, pp. 69 to 81, shows references by Congress to chocolate, *eo nomine*, as constantly distinguished from candy ("more fully called sugar candy" see Murray's Dictionary, p. 87 this Brief) in federal internal revenue and tariff statutes from the year 1792 to the present time. It was summarized by the Court below as follows (Record, pages 94-96):

> "In all the Tariff and Internal Revenue Acts of Congress from 1792 to 1913, candy, generally called 'sugar candy,' and chocolate and other products of the cacao bean, were separately classified. Chocolate has always, in the various acts, been referred to and taxed under an individual heading, indicating that Congress construed it to be a separate and distinct product for taxing purposes.
>
> "The Revenue Act of 1918 was being considered by Congress during the World War, at a time when there was much agitation as to the food value of chocolate and, when it was asserted that cholocate was a concentrated food, used by the enlisted men of the United States Army and others. This may or may not have had its effect upon the members of Congress.
>
> "The fact that Congress omitted to include chocolate in the 1918 act, taken in conjunction with the fact that it was specifically included in prior legislation, and was never before, either in congressional enactments or by executive regulation, included in the term 'candy,' is convincing proof of the intention of Congress to place no tax upon sweet chocolate or sweet milk chocolate in the 1918 Revenue Act.
>
> "The act of 1921 contains no reference to sweet

chocolate or sweet milk chocolate *eo nomine*, notwithstanding the fact that the regulations of the Commissioner, clasifying both as 'candy,' under the 1918 act and that the District Court decision in Massachusetts holding they were not taxable, was before the committee and Congress at the time of the consideration of the bill.

"It has been held in a number of cases that the intention of Congress, in revenue and import statutes, may be, and should be, determined by the manner in which the same articles were treated in former acts. Mr. J. Nelson, in delivering the opinion of the Supreme Court in the case of De Forest *et al. v.* Lawrence, 54 U. S. (13 How.) 274, 282, 14 L. Ed. 143, said:—

"'And, although it has been invoiced, and is known in trade and commerce, by the designation of sheepskin raw, and dried, and may, generally speaking, be properly ranged under the denomination of skins, as a class; yet, having a known designation in the revenue acts, distinct from the general class to which it might otherwise be assigned, we must regard the article in the light in which it is viewed by these acts, rather than in trade and commerce. For, when Congress, in legislating on the subject of duties, has described an article so as to identify it by a given designation for revenue purposes, and this has been so long continued as to impress on it a particular designation as an article of import, then it must be treated as a distinct article, whether there be evidence that it is so known in commerce or not. It must be taken as thus known in the sense of the revenue laws, by reason of the legal designation given to it, and by which it has been known and practised on at the custom-house.

"'It is but fair to presume, after having been treated by the law-makers for a considerable length of time as an article known by this designation, with a view to the assessment of the rate of duty upon it, that, if

intended to be charged specifically, or by enumeration, the designation by which it was known to them would have been used, instead of the one known to trade and commerce, if that should be different.'

"In Reich *v.* Smyth, 80 U. S. (13 Wall.) 162, 165, 20 L. Ed. 566, it was held:—

"'Congress having, therefore, defined the word in one act, so as to limit its application, how can it be contended that the definition shall be enlarged in the next act on the same subject, when there is no language used indicating an intention to produce such a result? Both acts are in *pari materia*, and it will be presumed that if the same word be used in both, and a special meaning were given it in the first act, that it was intended it should receive the same interpretation in the latter act, in the absence of anything to show a contrary intention.'

"The effect of the distinction recognized by Congress is very aptly referred to in the case of Arthur *v.* Stephani, 96 U. S. 125, 127, 128, 24 L. Ed. 771, wherein the court among other things, said:—

"'Should it be admitted, therefore, that chocolate is composed in part of the same substances that enter into the composition of ordinary confectionery, it must, nevertheless, stand upon the customs list as the distinct article so often described in the acts of Congress by its specific name. * * *

"'Contemporaneously and side by side, all the way down, the statutes provide for different rates of duty on the varieties of sugar and on confectionery, as well as on chocolate. Confectionery and chocolate are uniformly recognized as being different articles for the purpose of duties. * * *

"'It is quite evident that Congress has at all times intended to preserve the distinction between these articles, and that the circuit judge decided correctly when he held that chocolate, although in the form and

of the character, described was not dutiable as "confectionery" under the act of 1864.'

"This rule, so clearly stated, it appears to us, applies in full force to the facts presented in the case *sub judice.*"

In addition to the cases cited by the learned Court below, the following are helpful in considering this question:—

In re Schilling, et al., 53 Fed. 81, which was considered and approved by this Court in **U. S. v. Salambier, 170 U. S. 621,** is another case involving sweet chocolate. Shipman, Circuit Judge, in that case said:—

"This is an appeal by the United States from a decree of the circuit court for the southern district of New York, (see 48 Fed. Rep. 547,) which reversed the decision of the board of United States general appraisers upon the rate of duty properly to be assessed upon importations of sweetened chocolate, under the tariff act of October 1, 1890, (26 St. at Large, p. 567). The importations were made in October and December, 1890. 'Cocoa, crude,' or the cocoa bean, is upon the free list. Chocolate is the cocoa bean roasted, cracked, shelled, crushed, ground, and molded in cakes of about half a pound each. It contains no sugar, and is of general use in families. Sweetened chocolate, an article which is well known by that commercial name, is manufactured in the same way from the cocoa bean, but the paste is mixed with sugar, and it is principally used by confectioners to make chocolate confectionery. It is made in various sizes, from ten-pound cakes to wafers. A part of the importations in question was in ten-pound cakes, and the remainder was in small cakes of about two inches in length by one inch in width, and covered with papers of various colors. The article called in commerce 'prepared cocoa' is made from cocoa beans, which are roasted, shelled, and ground into a liquid condition. In this state it is put through a hydraulic

press, where the butter is pressed out, and it becomes a powder. Paragraph 238 of Schedule E of the act of October 1, 1890, places a duty of five cents per pound upon sugar candy and all confectionery, including chocolate confectionery, made wholly or in part of sugar of a specified value. Paragraph 239 places a duty of 50 per cent. *ad valorem* upon all other confectionery, including chocolate confectionery, not specially provided for in the act. The collector assessed a duty upon the importation of 50 per cent. *ad valorem*, under paragraph 239 and the similitude section, upon the ground that the merchandise assimilated in material, quality, and the use to which it may be applied to chocolate confectionery. The importers protested, claiming that the article was dutiable at two cents per pound, either under paragraph 318 or paragraph 319 of Schedule G of the same act. Paragraph 318 reads as follows: 'Chocolate, (other than chocolate confectionery, and chocolate commercially known as "sweetened chocolate,") two cents per pound.' Paragraph 319 is as follows: 'Cocoa, prepared or manufactured, not specially provided for in this act, two cents per pound.' The board of general appraisers, being of opinion that paragraph 318 was improperly punctuated, that the parenthesis should end at the word 'confectionery,' and that punctuation was no part of a statute, reversed the action of the collector, and adjudged that the article was dutiable at two cents per pound under paragraph 318. The circuit court reversed the decision of the board of appraisers, and adjudged that the article should have been classified for duty under paragraph 319.

"It cannot safely be contended that the importations were chocolate confectionery. The two articles differ from each other in fact and in commercial designation, and, while sweetened chocolate in the form of wafers or sticks may often be used as a confection, it is a different thing from chocolate confectionery, which is

*sweetened chocolate mixed with cream or fruits, or covered with sugar or other flavoring material.** Neither can the similitude section be resorted to if the article was enumerated in the existing tariff acts, either by specific or general designation. The question of interest in the case is whether the parenthetical punctuation of paragraph 318 can be so disregarded that the sentence can be construed as follows: 'Chocolate, (other than chocolate confectionery,) and chocolate commercially known as "sweetened chocolate," two cents per pound.' The legislative history of this paragraph seems to be that, as it passed the house of representatives, it was in the following form: 'Chocolate, other than chocolate confectionery, and chocolate commercially known as "sweetened chocolate," three cents per pound.' As it passed the senate it was in the following language: 'Chocolate, two cents per pound.' As reported to the two houses by the conference committees, and as passed by congress, the paragraph was in the form in which it is now printed. It was subsequently officially, and, no doubt, truthfully, stated by members of each branch of the committees of conference, that the clerks of the two committees, in preparing the report, made a mistake by ending the parenthesis in the wrong place. The error has not been corrected by congress, although the subject has received its attention.

"It is truly said that punctuation is no part of a statute, and that, therefore, punctuation can be changed in accordance with the obvious intent of the legislature; and it is also said that the inclosing a portion of a sentence in brackets is simply punctuation. A 'parenthesis' is defined to be 'an explanatory or qualifying clause, sentence, or paragraph inserted in another sentence, of in the course of a longer passage, without being grammatically connected with it.' Cent. Dict. It is used to limit, qualify, or restrict the mean-

*Italics ours.

ing of the sentence with which it is connected, and it may be designated by the use of commas, or by a dash, or by curved lines or brackets; but the use of curves or of brackets unmistakably shows that the clause thus included was supposed by the author or by the scrivener to limit or restrict a general meaning of the language with which it is connected, or to be of importance in explaining the meaning. The curved lines or brackets are, it is true, punctuation, but they are made with forethought, and for the purpose of clearness and definiteness. They designate much more distinctly than by the use of commas the character of the clause which is included. Apart from the declarations of the members of the conference committees upon the floor of congress, it could hardly be claimed that the intent of the statute plainly required a change in the punctuation. An inference could be drawn from the history of the statute before it reached the committees of conference, but, in view of the manifest limitation by the parenthesis, such an inference would not be controlling. Are, then, the declarations of the members of the committees sufficient to authorize a court to change the manifest meaning of a statute as it passed the legislative body and received the approval of the president, and to construe it in accordance with the intention of the committees? I think that such a judicial construction of a statute is akin to judicial legislation, which, as congress has refused to act upon the subject, it is well to avoid.

"The remaining question, whether sweetened chocolate can be classified under paragraph 319, is a more doubtful one. It is obvious that if the article was enumerated in the act of October 1, 1890, it must necessarily have been included in very general terms. All the articles which have been described are in fact manufactured from crude cocoa. The term 'cocoa, manufactured' is not a commercial term, and is broad enough to include the preparations of chocolate which

are not more specifically mentioned in the comprehensive statute of 1890, and within that paragraph the article in question finds an appropriate dutiable place.

"The decree of the circuit court is affirmed."

United States vs. McLaughlin and Freeman (No. 2601), 13 Court of Customs Appeals 404, is one of the last of a long line of customs decisions which followed the earlier cases. As the case is of importance in its discussion of the differences between sweet chocolate on the one hand and candy and confectionery on the other, this decision is also quoted at length as follows:—

"Before GRAHAM, Presiding Judge, and SMITH, BARBER, BLAND, and HATFIELD, Associate Judges.

"SMITH, Judge, delivered the opinion of the court:

"Triangular bars of sweetened chocolate, manufactured by *Societe Anonyme Chocolat Tobler* of Berne, Switzerland, and containing 37.75 per centum of chocolate, 0.60 per centum of almonds, 60 to 61 per centum of sugar and 1 to 2 per centum of honey, were classified by the collector at the port of Boston as confectionery, and assessed for duty at 40 per centum ad valorem, under paragraph 505 of the Tariff Act of 1922, which paragraph, in so far as pertinent, reads as follows:

"'PAR. 505. Sugar candy and *all confectionery* not specially provided for, 40 per centum ad valorem.'

"The importer protested that the merchandise was sweetened chocolate and claimed that it was therefore dutiable at 17½ per centum ad valorem under paragraph 775 of the Tariff Act of 1922, which reads as follows:

"'PAR. 775. Chocolate and cocoa, sweetened or unsweetened, powdered, or otherwise prepared, 17½ per *centum ad valorem*, but not less than 2 cents per pound; cacao butter, 25 per centum ad valorem.'

"The board sustained the protest and the Government appealed.

"There is no dispute as to the facts and on the agreed statement of counsel they must be taken as hereinbefore recited.

"Chocolate is a paste or cocoa made of cacao seeds, roasted or ground and often mixed with *sugar and some flavoring* ingredient. *Protest of Davis, et al.*, T. D. 18141. See "Chocolate"—New Standard Dictionary. From that definition it is apparent that the sweetening and flavoring of roasted and ground cacao seeds does not remove the article so manufactured from the category of chocolate.

"The word 'confectionery' is a generic term which comprises sweets, sweetmeats and comfits. See sweet, sweetmeat, comfit—New Standard Dictionary. It may be said therefore with entire truth that chocolate sweetened and flavored is a species or a kind of confectionery. That sweetened chocolate and chocolate confectionery are classes of chocolate and kinds of confectionery seems to have been recognized by paragraphs 318 and 238 of the act of 1890, which read as follows:

"'PAR. 318. Chocolate (other than chocolate confectionery and chocolate commercially known as sweetened chocolate), 2 cents per pound.

"PAR. 238. Sugar candy and all confectionery, *including chocolate confectionery, made wholly or in part of sugar* * * * 5 cents per pound.'

"In 1894 chocolate confectionery was taken out of the confectionery paragraph and transferred with sweetened chocolate to the chocolate paragraph, as appears from paragraphs 229 and 183 of the act of 1894, which paragraphs read as follows:

"'PAR. 229. Cocoa, prepared or manufactured * * * 2 cents per pound; *chocolate, sweetened, flavored, or other*, valued at 35 cents per pound or less, 2 cents per pound; valued at exceeding 35 cents per pound and *chocolate confectionery*, 35 per centum ad valorem.

"'PAR. 183. Sugar candy, and all confectionery, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored, or in any way adulterated, 35 per centum ad valorem; glucose, or grape sugar, 15 per centum ad valorem; saccharine, 25 per centum ad valorem.'

"That transfer was in strict accord with a legislative policy which ever since 1792 has recognized chocolate and confectionery as separate entities for tariff purposes. 1 Stat. p. 259; 3 Stats. p. 311; 4 Stats. p. 28; 5 Stats. p. 558; 9 Stats. p. 44; 12 Stats. p. 180, 189; 16 Stats. p. 262; 17 Stats. p. 231; Schedule B, act of March 3, 1883, pp. 331, 332, and 333; Rev. Stats. 468, 474, 475; act of 1890, pars. 238, 239, 303; act of 1894, par. 183, 218, 229; act of 1897, pars. 212, 218, 263; act of 1909, pars. 219, 274, 292; act of 1913, pars. 180, 217, 231; act of 1922, pars. 505, 775.

"In the case of *Arthur* vs. *Stephani*, the Supreme Court held that chocolate although *ordinarily sold as confectionery*, was nevertheless dutiable as chocolate inasmuch as it was more specifically provided for under that name. The court expressly stated that if the same substances entered into the composition of chocolate as were used in making ordinary confectionery, such chocolate would nevertheless be dutiable under that name and not as confectionery. *Arthur* vs. *Stephani*, 96 U. S. 125, 126, 127, 128.

"The importation is sweetened chocolate which contains 0.6 of 1 per centum by weight of crushed almonds. That small percentage of almonds was probably added for flavoring purposes, but whether it was or not, it can not be said the almonds were a distinctive feature of the product or that their introduction created a product which was not entitled to bear the name of sweetened chocolate. Six-tenths of 1 per centum by weight of almonds was negligible in the commodity and no more removed the commodity from

the common understanding of chocolate than would the addition of 0.6 of 1 per centum of vanilla extract or almond oil.

"We think that chocolate sweetened and flavored is confectionery and that it belongs to that class of confectionery denominated as chocolate by people in general. Taking into account the common meaning of the terms chocolate and confectionery, the fact that chocolate is a sweetmeat, the long maintained tariff distinction between confectionery and chocolate, the reasoning of the Supreme Court in *Arthur* vs. *Stephani, supra*, and the legislation which more specifically provides for the importation as chocolate than as confectionery, we are of the opinion that the merchandise here the subject of protest, is dutiable as sweetened chocolate at 17½ per centum ad valorem under paragraph 775.

"The judgment of the board is *affirmed.*"

Most, though by no means all, of the statutes appearing in respondents' Exhibit 12 are tariff acts, not internal revenue acts. It is well settled, however, that prior tariff acts may be considered in order to ascertain the intent of Congress in the use of words in internal revenue acts. An examination of the following cases will leave no doubt on this point.

In **Taylor vs. Treat, 153 Fed. 656 (1907),** which was affirmed by C. C. A. in 166 Fed. 1021, a suit was brought to recover excise taxes paid upon the sale of *"vermuth,"* the tax having been collected under the War Revenue Act of 1898 which taxed *"sparkling or other wines."*

In reaching the conclusion that "vermuth" was not "wine" within the meaning of the War Revenue Act of 1898, Judge Hough said (p. 657-658):—

"From the evidence of trade usage and nomenclature introduced, I find that there is no general trade consensus of opinion regarding this article. The

plaintiff's witnesses are sure that vermuth is not a wine, and not known or regarded as wine in the United States; but they are largely interested in the event of this suit. Those opposing them too frequently limit their statement that vermuth is a wine to their personal opinion to render it possible for me to believe that they are testifying to any general custom or uniform usage. But a considerable majority of all the witnesses agree that they buy and sell, advertise and drink, vermuth by that name alone. It is urged that this habit means no more than does the custom of alluding to sherry or port by those names without adding the word 'wine'; but this argument does not meet the proven method (above alluded to) of advertising vermuth in circulars and newspapers. I therefore find that the fluid has no other trade name or fame except as vermuth simpliciter, and is in the minds of American dealers and consumers an article of its own class, having no more mental relation to wine than chartreuse has to brandy."

And on pages 658-659 of his opinion Judge Hough lays great stress on the phraseology of Congress in the prior Tariff Acts and the distinct separation of the two things *eo nomine*:—

"*But in my opinion the plaintiffs are overwhelmingly entitled to judgment upon consideration of past tariff legislation on this subject.** Vermuth first appeared as a dutiable article in Act July 14, 1870, 16 Stat. 263, c. 255, and it is there classified with 'cordials, liqueurs, arrack, absinthe,' etc., in phraseology almost exactly borrowed from a similar catalogue (omitting vermuth) in Act Aug. 30, 1842, 45 Stat. 560, c. 270. In Act June 6, 1872, 17 Stat. 233, c. 315, section 4 provides: 'On vermuth the same duty as on wines of the same cost.' Here for the first time vermuth is separated

*Italics ours.

from cordials and liqueurs. In Act March 3, 1883, c. 121, § 1, Schedule H, par. 296, 22 Stat. 505 (U. S. Comp. St. 1901, p. 1654), there is provided on 'vermuth the same duty as on still wines.' In Act Oct. 1, 1890, c. 1244, § 1, Schedule H. 26 Stat. 589 (U. S. Comp. St. 1901, p. 1654), paragraph 336 lays a duty on 'still wines including ginger wine or ginger cordial and vermouth in casks, 50 cents per gallon,' and this phraseology was repeated in Act Aug. 27, 1894, c. 349, § 1, Schedule H, par. 244, 28 Stat. 589 (U. S. Comp. St. 1901, p. 1654). By the tariff act of 1897 (Act July 24, 1897, c. 11, § 1, Schedule H. 30 Stat. 174 U. S. Comp. St. 1901, p. 1654), which was in force at the time of the passage of the war revenue act, it is provided in paragraph 296, that 'still wines including ginger wine or ginger cordial and vermouth' shall pay duty in proportion to the amount of alcohol therein contained, provided that any 'wine, ginger cordial or vermouth imported containing more than 24 per cent. of alcohol shall be classed as spirits and pay duty accordingly.' The reciprocity section (3) of the same act of 1897 speaks of 'still wines and vermouth.'

"As was done in Seeburger *vs.* Castro, 153 U. S. 32, 14 Sup. Ct. 766, 38 L. Ed. 624, it seems to me necessary to interpret the internal revenue act in harmony with the tariff legislation of the country. From the foregoing resume of tariff acts, it is, I think, clear that at no time has any revenue act of the United States regarded vermuth as a wine. It is in composition quite as much changed as the 'Bovrill wine,' which was refused classification with wine in United States *vs.* Shoemaker (C. C.) 84 Fed. 146, a case decided under the tariff act of 1890 (above quoted)."

In **Forbes Lithograph Co. vs. Worthington, 132 U. S. 655,** the question involved an interpretation of the Tariff Act of 1883 and Chief Justice Fuller, writing the

opinion for this Court, reviewed many of the previous revenue acts in which the words in question were used, and referred particularly (p. 660) to phraseology used by Congress in the War Revenue Act of June 30, 1864, 13 Stat L. 267 in support of his conclusion.

Reference to phraseology in a previous Internal Revenue Statute as an aid to determine the Congressional meaning of similar phraseology in a later Tariff Statute seemed so natural and proper to Chief Justice Fuller that he evidently did not think it necessary to comment on the practice.

In **Seeberger v. Castro, 153 U. S. 32,** this Court had under consideration certain phraseology and words used in the Tariff Act of 1883. This Act provided for a duty on "tobacco, *manufactured*, of all descriptions, and stem tobacco, not specially enumerated or provided for in this act, forty cents per pound" and the goods in question (invoiced as "cigar clippings") had been classified by the Collector under this section. The importer protested that his goods should have been classified as dutiable under another paragraph of the same Act reading as follows: "Tobacco, *un*manufactured, not specially enumerated or provided for in this act, thirty per centum *ad valorem,*" and brought this suit to recover the difference in duty paid. In holding that the article was "*un*manufactured tobacco" and dutiable as such, Mr. Justice White said (page 35):—

> "It seems to us, however, that both the meaning of the word 'manufactured' and the analogy of the internal revenue provisions require us to hold that these scraps are not manufactured tobacco."

and later (page 36):—

> "Resort to the provisions of the internal revenue laws regarding tobacco seems to us to strengthen rather than to militate against our conclusion"

(page 38):—

> "It follows, therefore, that if, under the rule of *pari materia*, we interpret the provision of the tariff

act of 1883 along with the provision of the internal revenue acts, thus quoted, we could not hold the scraps or waste to be a manufactured article, unless we said that that which is neither manufactured nor partially manufactured was yet a manufactured article."

In **Boston Sand and Gravel Company v. United States, 278 U. S. 41,** we have in a measure the converse of the argument in the present cases. In the Boston Gravel Case the plaintiff was contending that the meaning of the phrase "legal damages" (as used by Congress in an act permitting suits against the United States to recover for a collision) included interest because that was the plain, popular meaning of the phrase. In reply to this the Government cited several prior acts as legislative history to show that Congress by the use of the phrase "legal damages" did not intend to include interest. In dismissing the contention of the plaintiff in that case and adhering to the congressional intention as shown by the prior acts, Justice Holmes said (page 48):—

> "It is said that when the meaning of language is plain we are not to resort to evidence in order to raise doubts. That is rather an axiom of experience than a rule of law and does not preclude consideration of persuasive evidence if it exists. *If Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.*"*

3. The structure and legislative history of the subdivision providing for a tax on candy in Section 900, Title IX, of the Acts of 1918 and 1921 indicate that Congress did not intend to impose a a tax on chocolate.

Except for numerals the language of the section in the two acts is the same and reads as follows:—

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* Italics ours.

Revenue Act of 1918, Title IX, Section 900, subdivision 9 (Act of Feb. 24, 1919, 40 Stat. L. 1057, 1122):

"(9) Candy, 5 per centum";

Revenue Act of 1921, Title IX, Section 900, subdivision 6 (Act of Nov. 23, 1921, 42 Stat. L. 227, 292):

"(6) Candy, 3 per centum";

Congress in these sections used the single word *candy* and did not use in either act the words sweet chocolate or sweet milk chocolate.

These sections providing for the tax on candy did not add to that word any general language inclusive in character to indicate an intent to include within the designation candy any commodities other than candy, though used for the same purpose and bearing the same general character.

The fact that Congress intended to limit the tax to candy alone and not to include another commodity of a similar nature or use is evidenced by the fact that Congress, when providing for a tax in other sub-divisions of this same Section 900, did use general language such as may be found in sub-divisions (1), (2), (3), (5), (6), (14), (19) and (20).

Title IX Section 900, Revenue Act of 1918:—

"(1) Automobile trucks and automobile wagons, (including tires, inner tubes, *parts, and accessories therefor,* sold on or in connection therewith or with the sale thereof), 3 per centum;

"(2) Other automobiles and motorcycles, (including tires, inner tubes, *parts, and accessories therefor,* sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

"(3) Tires, inner tubes, *parts, or accessories,* for any of the articles enumerated in subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

"(5) Tennis rackets, nets * * * skates, snowshoes * * * baseballs, fishing rods * * *

checker boards * * * games * * * *and all similar articles commonly or commercially known as sporting goods,* ten per centum;"

"(6) Chewing gum *or substitutes therefor,* three per centum."

"(14) Thermos and thermostatic bottles, carafes, jugs, *or other thermostatic containers,* five per centum."

"(19) Articles made of fur on the hide or pelt *or of which any such fur is the component material of chief value,* ten per centum."

"(20) Yachts and motor boats * * * *and pleasure boats and pleasure canoes* * * * ten per centum."

In the Revenue Act of 1921, Congress again used the single word *candy* (sub-division (6) of Section 900, Title IX), although in other sub-divisions of the same section inclusive words and phrases are used to extend the tax to articles similar to, or adapted to similar use, or having similar characteristics to, the articles taxed *eo nomine* in such other sub-divisions.

In Section III of petitioner's Brief (pp. 24-28) there are two points, *inter alia,* which seem clearly without sufficient foundation to justify the distinctions attempted to be made by the Government between the position taken by the respondents that "candy" was not intended by Congress to include "sweet chocolate" and the position taken by the Government that "candy" does include "sweet chocolate." The argument in the Brief is to the effect that there is no weight to be given to the classification by Congress in the earlier Tariff Acts and Internal Revenue Statutes between "candy" on the one hand and "chocolate" on the other, because in the earlier statutes the phrase designating one classification is "sugar candy, and all confectionery not specially provided for in this section.". It is urged that if in these statutes "chocolate" had not been otherwise speci-

fied for taxation, it would have been included under that section. This may be fully conceded without varying in any degree the position taken by these respondents in reference to the value which these statutes have to show a clear distinction in the mind of Congress between "chocolate" on the one hand and "candy" or "sugar candy" on the other. The duty to be levied in the absence of a special classification for "chocolate" under the section providing a duty on "sugar candy, and all confectionery not specially provided for in this section," would not be levied because "chocolate" is "sugar candy" but because "chocolate" is a confectionery as is also "sugar candy." The fact that "chocolate" and "candy" are both commodities which, with many others may properly be classed as confectionery, does not make "chocolate" "candy" or make "candy" "chocolate." None of the decisions referred to by the Government and none of the Acts of Congress over the long period of years in which the Tariff and Revenue Acts have been passed, give to the word "candy" the class status of the word "confectionery" so that it may lawfully be interpreted to include all commodities which are properly classed under the designation of "confectionery."

The argument in this section of the Government's brief also insists that Congress intended solely to tax "luxuries" by the excise taxes in the Revenue Acts of 1918 and 1921 under consideration, and that because "candy" was taxed and candy made a luxury, "chocolate," if eaten in preference to "candy," becomes a luxury to the consumer, and therefore was intended to be included under the term "candy" and therefore becomes a luxury for the purpose of taxation. A reading of the statute weakens the force of this argument even though there may be foundation, in the report of the Committee, for the thought that such was the general purpose of the Act. That "automobile trucks and parts"; "automobile wagons"; "motor-cycles"; "tires or accessories"; "firearms, shells and cartridges"; "hunting and bowie knives"; "dirk knives, daggers and brass or metallic knuckles"; "automatic slot vending machines";

"toilet soap and toilet soap powders," were articles solely of luxury and thereby taxed for that purpose, would not be universally conceded. It is suggested that had the Circuit Court of Appeals in the **Baker Case** analyzed the Act more carefully it might have taken judicial knowledge of the fact that "toilet soap" was somewhat of a necessity even to the citizens of Massachusetts and not merely a luxury such as "candy" is claimed to be.

The legislative history of the war excise taxes shows constant effort on the part of manufacturers of many articles proposed for taxation to induce Congress to eliminate the differential which the tax upon such articles would create in favor of a competing article not included in the proposed legislation.

Section 900 of the Revenue Acts of 1918 and 1921 had a similar history, and throughout its formulative period the candy manufacturers, through their National Confectioners' Association, constantly endeavored to induce Congress to tax articles in competition with candy, and particularly to tax sweet chocolate and sweet milk chocolate.

The evidence in the case at bar shows the extent to which such efforts were directed before the Ways and Means Committee of the House of Representatives and before the Finance Committee of the Senate during the time when the Revenue Act of 1921 was being drafted.

The hearings before these Committees were held upon the proposed bill which carried under Title IX, Section 900, sub-division (6), *candy* as the product to be taxed. There was no provision for a tax upon sweet chocolate or sweet milk chocolate. The representatives of the candy manufacturers specifically referred in their argument against taxing candy alone to the fact that the United States District Court of Massachusetts had held that sweet chocolate and sweet milk chocolate were not candy and therefore not taxed. They impressed upon the members of the House and Senate Committees the necessity for using inclusive language to extend the tax upon candy to sweet chocolate and sweet milk chocolate in order that the com-

petition between these products might be equalized. The fact that both Houses of Congress were aware of the limit of the tax resulting from the use of the word candy is shown by the statements of the members of the Committees in charge of the bill in discussing the scope of the section in question both at the hearings and upon the floor of Congress:—

> Congressman Frear of the House Committee clearly showed that sweet chocolate and sweet milk chocolate were not within the tax on candy because in referring to "small sweet chocolate bars," he asked (Record, page 41), *"Would it help matters if we taxed them?"*

> Statement of Senator LaFollette (of the Senate Finance Committee) on the floor of Senate (Record, page 42): *"Sweet chocolate is not taxed as candy at all. It is not candy and is not so taxed."*

> And Senator McLean on the floor of the Senate (Record, page 43): "For instance, *sweet chocolate is not taxed at all.* * * *"

Surely, if there were any doubt concerning the scope and meaning of the word candy as used by Congress, it would be resolved by the fact that *although Congress was expressly advised of the judicial construction of the word by the Federal court, no change or addition was made in the Act of 1921.*

In **Hecht v. Malley, 265 U. S. 144,** the question was whether the Trustees under a certain "Massachusetts Trust" were subject to the special excise tax imposed upon certain "associations" by the Revenue Act of 1916. This act imposed a special excise tax upon "every corporation, joint

stock company or association, now or hereafter *organized in the United States* for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States, or any state or territory."

The Corporation Tax Law of 1909 used the same phraseology except that the words "in the United States" were not included after the word "organized," and in the case of Eliot *v.* Freeman, 220 U. S. 178, 185 (1911), this Court held that the phrase "now or hereafter organized for profit" as used in the 1909 Act did not include a Massachusetts Trust.

In holding that such a Massachusetts Trust was not within the meaning of the 1916 Act, Mr. Justice Sanford said, page 153:—

> "The words 'organized in the United States' have no different effect, as applied to domestic corporations, joint-stock companies and associations, from the word 'organized' as used in the Act of 1909, and in no wise remove the ensuing general limitation that they must be such as are 'organized under the laws of the United States, or any State or Territory.'
>
> "And since these limiting words, when used in the Act of 1909, had been held by this Court, in Eliot *vs.* Freeman, to show the intention of Congress to embrace within the statute only such corporations and joint-stock associations as 'are organized under some statute, or derive from that source some quality or benefit not existing at the common law,' they must be given the same meaning and effect when used in the Act of 1916. In adopting the language used in an earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment. Sessions *vs.* Romadka, 145 U. S. 29, 43; Latimer *vs.* United States, 223 U. S. 501, 504."

* * * * * * *

"We conclude that as the trusts involved in these four cases are not organized under any statute and derive from such source no quality or benefit, they are not within the terms of the excise tax provision of the Act of 1916."

In **Latimer vs. United States, 223 U. S. 501, 504,** it was held that Congress, in using the words "unmanufactured tobacco" in the Tariff Act of 1897 (30 Stat. L. 194, 169), paragraph 215, must be deemed to have adopted the construction given by the Court to those words as used in an earlier tariff act.

Justice Lamar on pages 503-4 in this case said:—

"There has been some difference of opinion as to the proper classification of scrap tobacco under the various tariff acts. In United States *vs.* Schroeder. 93 Fed. Rep. 448, a higher grade of scrap was held to be 'waste' within the meaning of the tariff act of 1890. In Seeberger *vs.* Castro, 153 U. S. 32, it was decided that the clippings from the ends of cigars were dutiable as unmanufactured tobacco under the tariff act of 1883.

"The plaintiff claims that this decision has no application here, because it related to clippings which were of a higher grade than scrap, and for the further reason that, as the importer there made no claim that it should be taxed as waste, the court did not pass on that question. But it did definitely decide that such material, by whatever name called, was 'unmanufactured tobacco.'

"The words, having received such a construction under the act of 1883, must be given the same meaning when used in the tariff act of 1897, on the theory that, in using the phrase in the later statute, Congress adopted the construction already given it by this court."

* * * "The judgment is therefore affirmed."

In the cases at bar Congress used the word candy in the 1918 Act with knowledge that this Court in Arthur *v.* Stephani (*supra*) had definitely decided that (for the purpose of the statutes there considered) *sweet chocolate was chocolate and was not dutiable as confectionery.* Congress used the same word candy in the 1921 Act not only with that decision before it but also with definite knowledge of the decision of Judge Morton in the Baker case, holding that *sweet chocolate and sweet milk chocolate were not candy.*

The learned Court below, on the authority of the decisions of this Court gave weight to these facts in arriving at the intent of Congress (R. 97):—

> "The deliberations of the committees and the facts produced before them when considering the bill appear to be legal evidence and should be given its due weight. Holy Trinity Church *v.* United States, 143 U. S. 457, 464, 12 S. Ct. 511, 36 L. Ed. 226; Binns *v.* United States, 194 U. S. 486, 495, 24 S. Ct. 816, 48 L. Ed. 1087.
>
> "In spite of the knowledge of the Representatives and Senators in Congress, no definite tax was levied on sweet chocolate or sweet milk chocolate; and, from the manner in which Congress has always treated this subject, and in view of the special knowledge it had prior to the passage of the 1921 act, we are satisfied that Congress did not intend to include either of these products in the Revenue Acts of 1918 or 1921."

This rule has been approved by this Court as recently as **Graham v. Goodcell, U. S. , 75 L. ed. 242,** where Mr. Chief Justice Hughes said (p. 251):—

> "The view that the word 'stay' was intended to embrace this voluntary delay is supported by the statements in the reports of the committees in the House of Representatives and the Senate."

4. Article 22, of Treasury Regulations 47 under the Act of 1918, and Article 19, of Treasury Regulations 47 under the Act of 1921, are both invalid.

The Government, in the Trial Court and in the Circuit Court of Appeals, relied upon the regulations promulgated by the Commissioner of Internal Revenue to justify the taxes imposed upon the chocolate and sweet milk chocolate sold by the respondents during the years in question, and in the brief in support of the writs for certiorari, and now on the merits, it is contended that these regulations are valid. Their validity is not asserted on the ground that they are reasonable but rather on the ground that, having been promulgated to enforce the provisions of the Revenue Acts of 1918 and 1921 and having been continued in force with the amendments that are shown in the record, they became a part of the Revenue Acts in question, and that the applicable decisions of this Court require that action under them be sustained.

The consideration given to these questions by the learned Court below resulted in the conclusion expressed by Judge Avis (R. p. 97):—

> "In both the Revenue Acts of 1918 (40 Stat. 1143, §1309) and 1921 (42 Stat. 309, §1303) the authority of the Commissioner to make needful rules and regulations, with the approval of the Secretary, is in the following language:
>
> " 'That the Commissioner, with the approval of the Secretary, is hereby authorized to make all needful rules and regulations for the enforcement of the provisions of this act.'
>
> "It will be noted in this statute that it provides for 'rules and regulations' which shall be 'for the enforcement of the provisions of this act.'
>
> "The question involved on this phase of the case rests somewhat upon a construction of the statutes. Certainly the Commissioner and/or the Secretary have no au-

thority to make law; this power rests in Congress, unless some ambiguity exists, and the regulation is reasonably in accordance with the statute.

"In the case of Morrill *v.* Jones, 106 U. S. 466, 467, 1 S. Ct. 423, 424, 27 L. Ed. 267, Chief Justice Waite said: 'The secretary of the treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what congress has enacted.' See, also, United States *v.* United Verde Copper Co., 196 U. S. 207, 25 S. Ct. 222, 49 L. Ed. 449.

"A regulation of an executive department construing a statute is given great weight, and is strongly persuasive, and has the force and effect of law, if made in pursuance of statutory authority, but Congress alone has the power to lay taxes. See Burk-Waggoner Oil Ass'n *v.* Hopkins (N. D. Tex.) 296 F. 492, and cases cited.

"Taking into consideration, the reading of the statute, the prior attitude of Congress with relation to imposition of taxes on chocolate, and the fact that the matter was considered and discussed in committee and on the floor of the Senate before the passage of the act of 1921, to the extent that the actual regulation defining 'candy,' afterward promulgated by the Commissioner and the Secretary, was submitted to the committee considering the bill, we are convinced that there was no ambiguity in the statutes which permitted or authorized the regulations imposing the tax on sweet chocolate or sweet milk chocolate, in the manner or to the extent contended for by the defendant appellee.

"We therefore hold that the imposition of the tax upon the product of appellants was not authorized by the regulation of the Commissioner, approved by the Secretary."

The Trial Court, Kirkpatrick, J., although finding for the Government, for the reasons stated in the opinion (Rec.

20-26), made no attempt to justify the judgment by the fact that the taxes in question were lawfully exacted by reason of the provisions of the treasury regulations, but on the contrary condemned the regulations in language which is as convincing as that of the Circuit Court of Appeals. In commenting upon the regulations so earnestly argued for by the Government, Judge Kirkpatrick says (Rec. p. 26):—

> "I have given no weight to the Treasury Regulations which enumerate certain articles included by the plaintiff's product as taxable, because (1) the authority given to the Secretary of the Treasury is not to define terms but to enforce the act as written, (2) the regulations do not so much attempt to define and include, as to exclude certain objects from the scope of the act, and (3) the regulations in question have scarcely been in undisputed operation long enough to entitle them to very great weight upon a question of statutory construction."

It therefore appears from the finding of these two Courts that the regulations so earnestly supported by the Government have been conclusively eliminated by them from these cases as the authority upon which to exact the taxes in dispute. The fact that this finding has been concurred in by both Courts below would seem to justify the thought that it will not be disturbed by this Court.

The power granted to the Commissioner of Internal Revenue to make regulations under these revenue acts is found only in the following sections:—

Section 1308 of Revenue Act of 1918, 40 Stat. L. 1057, 1143, reads as follows:—

> "Section 1308. That the Commissioner with the approval of the Secretary is hereby authorized to make all needful rules and regulations *for the enforcement* of the provisions of this Act."

Section 1303 of the Revenue Act of 1921, 42 Stat. L. 227, 309, reads as follows:—

> "Section 1303. That the Commissioner with the approval of the Secretary is hereby authorized to make all needful rules and regulations *for the enforcement* of the provisions of this Act."

The language used by Congress does not delegate to the Commissioner of Internal Revenue or to the Secretary of the Treasury the power to legislate nor are they given the power to enlarge, by definition or otherwise, the scope of the words used by Congress.

Article 22 (originally issued May 1, 1919; issued in revised form Dec. 27, 1920) and Article 19 of Regulations 47, upon which the government relies for authority to levy and collect the taxes involved in these suits, are set forth in full in Columns 1, 3 and 4 respectively in an exhibit attached to this brief (pages 82 to 85).

These Articles purport to define candy, but in fact they are merely a classification as candy of a number of products sometimes sold by confectioners. Sweet chocolate and sweet milk chocolate, have a well defined identity other than candy and obviously are included within the classification without any justification in fact or in law.

The lack of confidence of the Secretary of the Treasury in his original Regulation is shown by the language which he used in presenting it to Congress when the Revenue Act of 1921 was under consideration. In his Letter of Transmittal which was sent to the Chairman of the House Committee on Nov. 3, 1919, with his "Notes on the Revenue Act of 1918" (see Plaintiff's Exhibit No. 11, Record, page 44) the Secretary said:—

> "This material is not in the form of recommendations by the department, as a decision has not yet been reached with respect to all the suggestions; and, indeed, the department entertains serious doubt as to the advisability of the adoption of some of them."

Among these "notes" the following is found:—

"NOTES OF THE REVENUE ACT OF 1918.

"Section 900 (9). Tax on candy.

"This subdivision imposes a tax on candy sold by the manufacturer, producer, or importer.

"It has been suggested that the term 'candy' should be defined.

"The following definition of the term 'candy' is suggested:

" 'Strike out subdivision (9) and insert:

"Candy, 5 per centum. *Candy within the meaning of this subdivision—*

"(a) *Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams; nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruis and nuts not specified in paragraph* (b) *of this subdivision, pop corn and other cereals or cereal products not specified in paragraph* (b) *of this subdivision, mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows, sweetened licorice not taxed as cough drops under section 907 sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts; and all similar articles however designated;*

"(b) *Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste, nor glace or candied fruits purchased for and used in the manufacture of food products, such as ice cream, cakes, and pastries.*"

It will be seen at a glance by turning to pages 82 to 85 inclusive of this brief (where the above suggestion of the Secretary is set up in parallel columns with the various forms of the Regulation in question) that the suggested definition

is almost *verbatim* that of the Regulation, yet nowhere in his letter or in his "Notes" does the Secretary furnish Congress with a hint of this fact. At all events, Congress, when it came to enact the Revenue Act of 1921, paid no attention to the "suggestion" of the Secretary, though as previously shown, it had knowledge of the decision of the United States District Court of Massachusetts (subsequently reversed in Malley *v.* Walter Baker Company, 281 Fed. 41, *infra*) to the effect that sweet chocolate and sweet milk chocolate are not candy, and consequently are not taxable as candy,—which decision was, at that time, unappealed from.

In the case of **Cracker Jack Company v. United States, 67 C. Cls. 89,** the regulations under consideration here were considered by the Court of Claims, and the opinion by Graham, *J.*, explains the origin of them and approves of them in their application to "Cracker Jack," held to be a candy in fact by reason of its manufacture from boiled sugar, in the manner described in the opinion. The language of the opinion is interesting, particularly in its showing that the provisions of the regulation here under consideration were not those resulting from the exercise of a reasonable administrative discretion on the part of the Treasury Department, but were the adoption of a definition urged upon the Department by the National Confectioners Association for the purpose, as stated by the representatives of these *candy* manufacturers before the Committees of Congress, of extending the tax imposed upon candy to certain articles including sweet chocolate and sweet milk chocolate, which would be exempt from this taxation because of the limited language of the Statute. In that case Graham, *J.*, says (p. 96) :—

> "It is also true that the findings of administrative officers and their practice are presumed to be based upon conclusions which are the result of investigation. Congress having used the word 'candy' without definition, it becomes necessary as an administrative act for

the Commissioner of Internal Revenue to define it by regulations for the information of taxpayers. The representatives of the manufacturers of candies, confections, sweetmeats, etc., were before Congress prior to the passage of these acts and were heard. The clerk of the House Ways and Means Committee, where these hearings took place, was a Mr. Walker, who at the time of the making of the regulations (see Findings X and XI) defining 'candy' was Deputy Commissioner of Internal Revenue, and by reason of his service as clerk was generally acquainted with what took place before the committee. The Deputy Commissioner of Internal Revenue and the manufacturers had a conference, and the representative of the National Confectioners Association, which embraced about four-fifths of the manufacturers of candies, candied fruits, nuts, pop corn, and similar articles had conferences with Mr. Walker before, and was present at, the hearings where the Commissioner of Internal Revenue was represented by Mr. Walker, deputy commissioner, the Solicitor of Internal Revenue, and one of the attorneys in his office. After the hearing the regulations (Findings X and XI) embodying the definition of 'candy' were promulgated by the commissioner. This definition is in substantial conformity with a definition suggested at the hearing by the National Confectioners Association. So that it clearly appears that this definition was not reached until after careful hearing and consideration, which must necessarily increase the presumption as to its reasonableness. That it is not in conflict with the express language of the acts is clear. But, more than this, a reading of both acts, and particularly section 900 of each, above mentioned, shows that the purpose of these sections was to tax luxuries, that is, to tax articles the use or consumption of which would ordinarily be considered indulgence in a luxury rather than a necessary article of food.

"A description of the product and the process of its manufacture we think shows that its consumption is indulgence in a luxury. The plaintiff's product, known as Cracker Jack, consisted of pop corn mixed with a syrup, which after cooking crystallized. The syrup consisted of dissolved sugar, corn syrup, and molasses. It was cooked for a short time, and to it, while cooling, was added a small quantity of peanuts. After further cooking, this mixture of syrup and peanuts was poured into a tub containing pop corn and stirred and the mixture placed in reels where it was allowed to cool. The process of mixing and cooling was of such character that after cooling each kernel of pop corn was separated from the mass, but as separated had a coating of crystallized syrup. It was then automatically boxed in an air and moisture tight wax paper carton and in this form sold. The proportions of the mixture were as follows: Popped corn, 32.9%; peanuts, 8.3%; sugar, corn syrup, and molasses, 58.8%. It will be seen that this product is of the same kind and class as peanut brittle, candied fruit, and similar articles."

To the same effect is the decision of the same Court in **Shotwell Manufacturing Co. v. U. S., 67 C. Cls. 152.**

The application of the tax to "Cracker Jack" was due to the use by Congress of the word candy which obviously includes this confection made with boiled sugar, without regard to the regulation of the Treasury Department instigated and imposed upon the Department, substantially *verbatim*, by the candy manufacturers, who had failed in their efforts to secure its inclusion as a statutory definition of candy in the Act itself.

The decisions of **Brewster v. Gage, 280 U. S. 327; Universal Battery Company v. U. S., 281 U. S. 580,** and **Fawcus Machine Company v. U. S., 75 L. ed. 171,** used by the Government to justify its reliance upon the

provisions of the regulations here under consideration, as stated by Mr. Justice Roberts in the last named case, present a rule with which the respondents are in full accord (p. 173):

> "The regulations were made pursuant to express authority (see §1309 of the Revenue Act of 1918). They are valid unless unreasonable or inconsistent with the statute. United States *v.* Grimaud, 220 U. S. 506, 517, 518; International R. Co. *v.* Davidson, 257 U. S. 506, 514. They constitute contemporaneous construction by those charged with the administration of the act, are for that reason entitled to respectful consideration, and will not be overruled except for weighty reasons. United States *v.* Moore, 95 U. S. 760, 763; Brewster *v.* Gage, 280 U. S. 327, 336."

This rule, however, has no application to the cases now before this Court, not only for the other reasons hereinafter presented, but because of the reason given by Mr. Justice Roberts for denying its application in the case of **Poe v. Seaborn, 282 U. S. 101,** in which case, as in these, the language of the statute was too clear to permit an enlargement of its meaning by departmental regulations.

In **Crooks v. Harrelson, 282 U. S. 55,** Mr. Justice Sutherland said (p. 61):—

> "Finally, the fact must not be overlooked that we are here concerned with a taxing act, with regard to which the general rule requiring adherence to the letter applies with peculiar strictness. In United States *v.* Merriam, 263 U. S. 179, 187, 188, 68 L. ed. 240, 244, 29 A. L. R. 1547, 44 S. Ct. 69, after saying that 'in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used,' we quoted with approval the words of Lord Cairns in Partington *v.* Atty. Gen.,

L. R. 4 H. L. 100, 122, that if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The Regulations did not construe the statute for the purpose of enforcement, but attempted to enlarge it, so that what the National Confectioners' Association and the Commissioner thought had been unfairly omitted, might be included within its scope. To supply omissions transcends the administrative function.

Lynch vs. Tilden Company, 265 U. S. 315, involved the validity of a Treasury Regulation purporting to define "adulterated butter" as used in the Act of May 9, 1902 (13 Stat. L. 193). Section 4 of that Act provided that adulterated butter should include, *inter alia*:—

> "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream."

In 1907 the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, promulgated Regulations No. 9, which contain the following:—

> "Adulterated Butter Defined: The definition of adulterated butter as contained in the act of May 9, 1902, embraces butter in the manufacture of which any process or material is used whereby the product is made to 'contain abnormal quantities of water, milk or cream,' but the normal content of moisture

permissible is not fixed by the act. This being the case it becomes necessary to adopt a standard for moisture in butter, which shall in effect represent the normal quantity. It is therefore held that butter having 16 per cent. or more of moisture contains an abnormal quantity and is classed as adulterated butter."

Certain butter, upon which Tilden Company had paid a tax, and which concededly contained more than 16% moisture was seized by the Commissioner of Internal Revenue as "adulterated" and this suit was brought to recover the tax paid.

In declaring the Treasury Regulation invalid, this Court, speaking through Mr. Justice Butler, said (pages 320-322):

"The act does not prescribe the amount of moisture permissible or fix any rule or criterion by which to determine the amount that is deemed 'abnormal' or that lawfully may be absorbed and incorporated.

"The regulation makes water content the sole test of adulteration, without regard to other provisions of the act. In support of its validity, it is said that, in declaring 16 per cent. of moisture in butter is abnormal, the regulation does no more than to establish a scientific fact. But it goes beyond that, and declares such butter to be adulterated. It omits essential elements of the statutory definition: namely, the use of a process or material in the manufacture of the butter, and the causing of absorption,—*i. e.*, the incorporation or taking in from the outside,—of abnormal quantities of moisture."

* * * "The regulation prescribes a standard which Congress has not authorized the Commissioner or the Secretary to fix. It sets up a definition of adulterated butter which conflicts with that contained in the act.

The two cannot be read in harmony. If given effect, the regulation would eliminate from the definition of adulterated butter the conditions specified in the act and strike out words and phrases and substitute other for them. In effect, it would depart from and put aside the statutory definition. In some of the lower courts the regulation has been held invalid *United States* vs. *11,150 Pounds of Butter*, 195 Fed. 657, affirming 188 Fed. 157; *Baldwin Co-operative Creamery Association* vs. *Williams*, 233 Fed. 607; *Henningsen Produce Co.* vs. *Whaley*, 238 Fed. 650. But in *Coopersville Co-operative Creamery Co.* vs. *Lemon*, 163 Fed. 145, it was held valid. We think that decision fails to take into account and give proper weight to the conflict between the act and the regulation. See *Field* vs. *Clark*, 143 U. S. 649; *United States* vs. *Eaton*, 144 U. S. 677; In re *Kollock*, 165 U. S. 526; *Buttfield* vs. *Stranahan*, 192 U. S. 470; *Williamson* vs. *United States*, 207 U. S. 425; *United States* vs. *Grimaud*, 220 U. S. 506. It must be held that the regulation is invalid."

In **U. S. vs. United Verde Copper Company, 196 U. S. 207 (1905)**, it was held that the word "domestic" as used in the act of June 3, 1878, 20 Stat. 88, c. 150, permitting the use of timber on public lands for "building, agricultural, mining and other *domestic* purposes," is not to be construed as relating solely to household purposes but should be interpreted to include industries "local" to the place where the timber is as distinguished from "foreign" industries.

On page 215 Mr. Justice McKenna said in this case:—

"But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. Smelting may be a separate industry from mining,

but that does not deprive it of the license given by the statute. As we have already said, the general clause, 'other domestic purposes' is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining States and Territories when the statute was enacted, but there can be no doubt that smelting has such relation. *If rule 7 [illegible]valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary.** Congress has selected the industries to which its license is given, and has entrusted to the Secretary the power to regulate the exercise of the license, not to take it away. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or invest the Secretary of the Interior with the power of legislation."

In **Waite vs. Macy, 246 U. S. 606,** an action in equity was brought by an importer of tea against the Board of General Appraisers (acting under the Secretary of the Treasury) to restrain the enforcement of a Treasury regulation which fixed an arbitrary test for the determination of the purity and quality of tea.

The Treasury regulation was promulgated under the Act of 1897, as amended by the Act of 1908, and provided for the establishment of standards "of purity, quality and

*Italics ours

fitness for consumption, of all kinds of tea imported" and provided that the Secretary of the Treasury is given power to enforce the provisions of the Act by appropriate regulations. It was shown that while the tea in question could not comply with the test laid down in the Treasury regulation, it nevertheless was a very high grade tea worth nearly four times as much as the standard and the sole cause for rejecting it was the presence of a small percentage of Prussian blue which was not contended to be deleterious.

In holding the regulation invalid and sustaining the injunction, Mr. Justice Holmes said, at page 608:—

> "No doubt it is true that this Court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption. Morrill *vs.* Jones, 106 U. S. 466. United States *vs.* United Verde Copper Co., 196 U. S. 207, 215. United States *vs.* George, 228 U. S. 14, 21."

* * * * * * *

> "We are brought then to the merits, and we are of opinion that the rule cannot be sustained, notwithstanding that since a former board refused to follow it as it then stood, there has been added clauses intended to save it as a chemical analysis. The regulation makes the presence of any coloring matter an absolute ground for exclusion. But the only grounds recognized by the statute are inferiority to the standard in purity, quality and fitness for consumption, words repeated over and over again in the act. It cannot be made a rule of law that any tea that has an infinitesimal amount of innocuous coloring matter is inferior in those respects to a standard that has a much greater amount of other impurities and is worth only a quarter as much. All extraneous substances are impurities, and the presence of any may be detected in any way

found efficient. But one such substance cannot be picked out and accorded supremacy in evil by an absolute rule irrespective of any harm that it may do. We go one step further and add that in view of the facts as to the standard and this tea, the presence of the Prussian blue affords no adequate ground for keeping the tea out.

"The Secretary and the board must keep within the statute, Merritt *vs.* Welsh, 104 U. S. 694, which goes to their jurisdiction, see Interstate Commerce Commission *vs.* NorthernPacific Ry. Co., 216 U. S. 538. 544."

In **Iselin vs. United States, 270 U. S. 245,** which involved another Section of the 1918 Act, it was held that:—

Par. 3 of §800 (*a*) of Revenue Act of 1918, laying taxes on theater and opera tickets sold at newstands, hotels, etc., for more than the "established price" at the ticket office of the theater or opera house, was inapplicable to a sale by a stockholder of box tickets, issued as an incident of his investment in an opera house company, which were not sold at the box-office and for which there was no established price. P. 247.

A statute imposing taxes with particularity, and in plain, unambiguous language, cannot be enlarged by construction to cover other cases omitted through presumable inadvertence of the legislature. P. 250.

An administrative practice which enlarges the scope of an unambiguous statute, and which is neither uniform, general, nor long continued, can not be given legal force or effect, nor be accepted as a reason why subsequent reenactment of the statute without change should be taken as a legislative interpretation of its original meaning as justifying such practice. P. 251.

On pages 250 and 251, Mr. Justice Brandeis in this case said:—

"It may be assumed that Congress did not purpose to exempt from taxation this class of tickets. But the Act contains no provision referring to tickets of the character here involved; and there is no general provision in the Act under which classes of tickets not enumerated are subjected to a tax. Congress undertook to accomplish its purpose by dealing specifically, and in some respects differently, with different classes of tickets and with tickets of any one class under different situations. The particularization and detail with which the scope of each provision, the amount of the tax thereby imposed, and the incidence of the tax, were specified, preclude an extension of any provision by implication to any other subject. The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function. Compare United States *vs.* Weitzel, 246 U. S. 533, 543; Peoria & Pekin Union Ry. Co. *vs.* United States, 263 U. S. 528, 534, 535.

"The Government calls attention to the fact that, as early as October 24, 1919, the Commissioner of Internal Revenue made the ruling pursuant to which the tax here in question was assessed; that on March 22, 1920, the Attorney General sustained that ruling; that the provisions here in question were re-enacted without substantial change in the Revenue Act of 1921, Act of November 23, 1921, §800 (*a*), c. 136, 42 Stat. 227, and the Revenue Act of 1924, Act of June 2, 1924, §500 (*a*), c. 234, 43 Stat. 253; and that the administrative practice adopted in 1919 has been stedfastly pursued. It suggests that these facts imply legislative recognition and approval of the executive construction of the statute. But the construction was neither uniform, general, nor long-continued; neither is the statute ambiguous. Such departmental

construction cannot be given the force and effect of law. Compare United States *vs.* Falk & Brother, 204 U. S. 143; National Lead Co. *vs.* United States, 252 U. S. 140, 146."

Morrill vs. Jones, 106 U. S. 466, involved the validity of a Treasury regulation promulgated under Section 2505 of the Revised Statutes which provides among other things that "animals, alive, *specifically imported for breeding purposes* from beyond the seas, shall be admitted free (of duty), upon proof thereof satisfactory to the Secretary of the Treasury and under such regulations as he may prescribe."

Article 383 of the Treasury Customs Regulations provided that before a collector admits such animals free, he must among other things "be satisfied that the animals are of superior stock adapted to improving the breed in the United States."

Jones imported certain animals which he claimed should be admitted free as they were "specifically imported for breeding purposes." The collector, nevertheless, demanded duties because he was not satisfied that the animals were "of superior stock." Duties were paid under protest and this suit was brought to recover money so paid. The matter was permitted to go to the jury with instructions from the court that the Secretary of the Treasury had no power to prescribe what classes of animals imported for breeding purposes should be admitted free of duty, and the only question left for the jury was whether or not these particular animals had been specifically imported for breeding purposes. Verdict for the plaintiff.

In sustaining the lower court and holding that the Secretary could not lawfully make such a regulation, Chief Justice Waite said (page 467):—

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is

to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress was willing to admit duty free all animals specially imported for breeding purposes; the Secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the Secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

In this connection the case of **Funsten Company v. U. S., 65 U. S. C. Cls. 292,** is precisely in point, as the Regulations there considered were those now before this Court. Chief Justice Campbell, delivering the opinion of the court said:—

"The commissioner ruled that the dates sold in the larger containers of seven and fifteen pounds were not taxable as candy and the Government concedes this is correct. The Government also concedes that the use of the sugar for the purpose mentioned does not make the product candy but insists that the dates packed in the smaller containers are candy within the meaning of the taxing act. The reasoning that makes the line of separation between dates and candy lie in the size of the containers is not easy to follow. *If an article in a small box be candy it would seem that more of the same article in a large box would also be candy.* * * * Candy is one of the confectionaries, but all confections are not candy. The sale of the dates, prepared

as shown here, in small containers, if conceded to be sold as confections does not constitute a sale of candy. The tax in question is an excise tax laid on various articles and things, among them candy. *The quantitative method of determining the character of this article is not what the statute contemplates. The word should be interpreted according to its clear import.* It has been declared that in statutes levying taxes the literal meaning of the words employed is most important because such statutes are not to be extended by implication beyond the clear import of the language used. Merriam case, 263 U. S. 179, 187 [4 Am. Fed. Tax Rep. 3673]; Gould *v.* Gould, 245 U. S. 151, 153 [3 Am. Fed. Tax Rep. 2958]. The plaintiff should have judgment. And it is so ordered."

In the case of **Malley v. Walter Baker & Co., 281 Fed. 41,** upon which the Petitioner relies, Judge Anderson of the Circuit Court of Appeals for the First Circuit sustained the regulation, saying (Opinion, pages 46 and 47):—

"The distinction turns, not so much on the composition of the article, as on the way or form in which it is sold, and upon the use made of it by its purchasers.

"We think the Court below erred in holding invalid this distinction made by the Commissioner as to sweet chocolate."

* * * * * * *

"It comes to this: Congress intended that various compounds of sugar and other ingredients, practically all of which are also food ingredients, should, when compounded, sold, and consumed as candy, a luxury, be subjected to this tax. The distinction undertaken to be made by the department that sweet chocolate should be taxed when put up and sold in such form as to indicate that it was to be consumed as candy is

consumed, and not taxed when it was obvious from the packing or other circumstances surrounding the transaction that it was to be merely an ingredient for further manufacture is a sound distinction."

The decision of Judge Morton in the District Court of Massachusetts, which was held error by Judge Anderson, contains the following language, which, when read aloud, sounds like an echo of decisions of this Court herein cited:

"What Congress intended by the word 'candy' in the statute was a certain substance, a certain kind of thing. I am not called upon to define it. All I am called upon to say, and all I do say about it, is that I think chocolate is a distinct, separate substance by itself, and therefore is not within the scope of 'candy' and cannot be brought within that scope by a regulation."

It is a curious fact, heretofore noted, that while, in the cases at bar, the learned trial Judge, Kirkpatrick, *J.*, felt that the rule of comity required him to follow the decision of the Court of Appeals for the First Circuit in the **Baker Case** (Rec. p. 26), *he nevertheless stated that he had "given no weight to the Treasury Regulation"* (Rec. p. 26). The Circuit Court of Appeals for the Third Circuit, in its opinion by Judge Avis, not only condemned the regulation but refused to follow the **Baker Case** in any of its conclusions (Rec. p. 98):—

"The case of Malley *v.* Walter Baker & Co. (C. C. A. 1) 281 F. 41, is strongly relied upon by the appellee; it being the contention that this case is controlling as establishing a precedent which in effect should be followed. There is a marked difference in the facts as submitted in the two cases. In the Malley Case there was no decision upon the question of what Congress

intended to do, except from the construction of the statutes, and it is apparent that no evidence with relation to the prior attitude of Congress, or the proceedings of the committees of Congress in consideration of the bills, was submitted to the court considering that case. We are not able to follow that court in its inclusion of sweet chocolate and sweet milk chocolate in the technical definition of the word 'candy,' or in its conclusion that the Commissioner, with the approval of the Secretary, had the power and authority under the respective revenue laws to substitute his ruling for the plain action of Congress."

The test which Judge Anderson adopted in the Baker case has likewise been repudiated by this Court in **Benzinger v. United States, 192 U. S. 38.** In that case the question was whether certain plaster images of saints and angels were *"casts of sculpture"* under the free list of the tariff act of 1897 or *"church statues, composed of plaster of Paris, decorated,"* carrying under the same act a 45% duty. It was contended by witnesses and counsel for the Government that "casts of sculpture" were only "such classes of plaster casts or clay or marble or bronze as are to stand singly and alone, and not to be sold in endless numbers"—in other words that the test was the use to which the article was destined rather than some distinguishing physical characteristic of the article itself. In refusing to follow this test the Court said (p. 48):—

"We think the last definition is inaccurate and inadmissible. Under this view, whether a figure is a cast of sculpture or not, does not in the least depend upon how it is made. It is the use to which it is destined which is to determine what it is in fact. If there are to be a great many of them, to be 'sold in endless numbers,' they are not casts of sculpture, no matter how they are made, and if they are to 'stand singly' and 'be exhibited temporarily,' then they are

such casts. We are not satisfied as to the correctness or completeness of this definition. *Whether in one case the cast is for the use of the sculptor only or in the other is destined to be reproduced indefinitely, we think is not material.*"

A reason strongly urged by the Government (Petitioner's Brief, pp. 17-18) is that, if the decision of the Court below is affirmed, all of the taxes collected under the regulations in question from manufacturers of sweet chocolate have been wrongfully collected, and that the result of such a decision of this Court would be a more favorable treatment to the respondents than has been accorded to other similar manufacturers.

There would be no novelty in that situation in these United States, at least since March 1, 1913, during which many taxes have been wrongfully collected by the Government, and the ultimate decisions of this Court have protected certain taxpayers from such wrongful collections without benefit to others who have paid without protest.

It cannot be said, however, that merely because other manufacturers have paid taxes on sweet chocolate these respondents should now be estopped to claim their legal rights.

There is no evidence that the decision in the Baker case, *supra, which decided that a jury in the District Court should find whether sweet chocolate was candy as a question of fact,* ultimately resulted in the collection of any taxes from the Baker Company. It may fairly be assumed that astute counsel for the Government, having secured the decision from the Circuit Court of Appeals of the First Circuit of a scope far beyond any reasonable expectation which the Government could have had when that appeal was taken, may have graciously relieved the taxpayer of any burden of taxation by a settlement eminently satisfactory, with a result that left the Government in possession of a judicial decision for use as a weapon against other objecting manufacturers of sweet chocolate. The effect, however, upon these respondents was not that.

These cases have wended their weary way for more than ten years when the first claim for refund was filed. The filing of such claim is a fact which it may be assumed was a matter of common knowledge in the trade which, as the record shows, has such intimate knowledge of the affairs of all of its members (see hearings before House and Senate Committees on Revenue Act of 1921). If, with the knowledge that these respondents were denying the Government's right of taxation here claimed, other manufacturers of sweet chocolate paid their taxes without protest, there is certainly no basis for the claim made through the benevolent protectorate temporarily asserted by the Government that the Court should deny these respondents their legal rights.

Mr. Justice Sutherland, speaking for this Court in the recent case of **Crooks v. Harrelson (supra),** quotes, with approval, Lord Cairns to the effect that, "if there be admissible in any statute, what is called an "equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

In the recent case of **Burnet v. Niagara Falls Brewing Company, U. S. , 75 L. ed. 340.** Mr. Justice Butler said (p. 343):—

> "It is a familiar rule that tax laws are to be liberally construed in favor of taxpayers." (See also cases there cited.)

Surely the record in this case shows as great a difference between "candy" and "chocolate," by the use of rules recognized as appropriate by this Court to ascertain the meaning of Congress, as has been found to exist, also for the purpose of ascertaining legislative distinction, between "motor vehicle" and "aircraft." The recent decision of this Court in **McBoyle v. United States, No. 552, October Term 1930,** may be referred to in support of the conclusions advocated by the respondents, and in that case Mr. Justice

Holmes, announcing a limitation upon the Act of Congress of October 29, 1919, c. 89, U. S. Code, Title 18, Section 408, said:—

> "* * * the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used. United States *v.* Thind, 261 U. S. 204, 209."

CONCLUSION.

It is respectfully submitted that the judgments of the learned Circuit Court of Appeals should be affirmed.

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APPENDIX.

SECTION 900 OF TITLE IX OF REVENUE ACTS OF 1918 AND 1921.

REVENUE ACT OF 1918.

TITLE IX.—EXCISE TAXES.

Sec. 900.—That there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer, or importer, a tax equivalent to the following percentages of the price for which so sold or leased.

(1) Automobile trucks and automobile wagons, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motorcycles, (including tires, inner tubes, parts, and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories, for any of the articles enumerated in

REVENUE ACT OF 1921.

TITLE IX.—EXCISE TAXES.

Sec. 900.—That from and after January 1, 1922, there shall be levied, assessed, collected, and paid upon the following articles sold or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased—

(1) Automobile trucks and automobile wagons (including tires, inner tubes, parts, and accessories thereof, sold on or in connection therewith or with the sale thereof), 3 per centum;

(2) Other automobiles and motor cycles (including tires inner tubes, parts and accessories therefor, sold on or in connection therewith or with the sale thereof), except tractors, 5 per centum;

(3) Tires, inner tubes, parts, or accessories for any of the articles enumerated in

subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

(4) Pianos, organs (other than pipe organs), piano players, graphophones, phonographs, talking machines, music boxes, and records used in connection with any musical instrument, piano player, graphophone, phonograph, or talking machine, 5 per centum;

(5) Tennis rackets, nets, racket covers and presses, skates, snowshoes, skis, toboggans, canoe paddles and cushions, polo mallets, baseball bats, gloves, masks, protectors, shoes and uniforms, football helmets, harness and goals, basket-ball goals and uniforms, golf bags and clubs, lacrosse sticks, balls of all kinds, including baseballs, footballs, tennis, golf, lacrosse, billiard and pool balls, fishing rods and reels, billiard and pool tables, chess and checker boards and pieces, dice, games and parts of games (except playing cards and children's toys and games), and all similar articles commonly or commer-

subdivision (1) or (2), sold to any person other than a manufacturer or producer of any of the articles enumerated in subdivision (1) or (2), 5 per centum;

cially known as sporting goods, 10 per centum;

(6) Chewing gum or substitutes therefor, 3 per centum;

(7) Cameras, weighing not more than 100 pounds, 10 per centum;

(8) Photographic films and plates other than moving-picture films, 5 per centum;

(9) Candy, 5 per centum;

(10) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, the District of Columbia, or any foreign country while engaged against the German Government in the present war, 10 per centum;

(11) Hunting and bowie knives, 10 per centum;

(12) Dirk knives, daggers, sword canes, stillettos, and brass or metallic knuckles, 100 per centum;

(13) Portable electric fans, 5 per centum;

(14) Thermos and Thermostatic bottles, carafes,

(4) Cameras, weighing not more than 100 pounds, and lenses for such cameras, 10 per centum;

(5) Photographic films and plates (other than moving picture films), 5 per centum;

(6) Candy, 3 per centum;

(7) Firearms, shells, and cartridges, except those sold for the use of the United States, any State, Territory, or possession of the United States, any political subdivision thereof, or the District of Columbia, 10 per centum;

(8) Hunting and bowie knives, 10 per centum;

(9) Dirk knives, daggers, sword canes, stilettos, and brass or metallic knuckles, 100 per centum;

jugs, or other thermostatic containers, 5 per centum;

(15) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(16) Automatic slot-device vending machines, 5 per centum, and automatic, slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(17) Liveries and livery boots and hats, 10 per centum;

(18) Hunting and shooting garments and riding habits, 10 per centum;

(19) Articles made of fur on the hide or pelt, or of which any such fur is the component material of chief value, 10 per centum;

(20) Yachts and motor boats not designed for trade,

(10) Cigar or cigarette holders and pipes, composed wholly or in part of meerschaum or amber, humidors, and smoking stands, 10 per centum;

(11) Automatic slot-device vending machines, 5 per centum, and automatic slot-device weighing machines, 10 per centum; if the manufacturer, producer, or importer of any such machine operates it for profit, he shall pay a tax in respect to each such machine put into operation equivalent to 5 per centum of its fair market value in the case of a vending machine, and 10 per centum of its fair market value in the case of a weighing machine;

(12) Liveries and livery boots and hats, 10 per centum;

(13) Hunting and shooting garments and riding habits, 10 per centum;

(14) Yachts and motor boats not designed for trade,

fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than $15, 10 per centum; and

(21) Toilet soap and toilet soap powders, 3 per centum;

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 600 of the Revenue Act of 1917, be in lieu of such tax.

fishing, or national defense; and pleasure boats and pleasure canoes if sold for more than $100, 10 per centum.

If any manufacturer, producer, or importer of any of the articles enumerated in this section customarily sells such articles both at wholesale and at retail, the tax in the case of any article sold by him at retail shall be computed on the price for which like articles are sold by him at wholesale.

The taxes imposed by this section shall, in the case of any article in respect to which a corresponding tax is imposed by section 900 of the Revenue Act of 1918, be in lieu of such tax.

DEFINITIONS*

PROCLAIMED AND ESTABLISHED

BY THE SECRETARY OF AGRICULTURE IN COLLABORATION WITH THE ASSOCIATION OF OFFICIAL AGRICULTURAL CHEMISTS AND OTHER EXPERTS AND PUBLISHED IN "STANDARDS OF PURITY FOR FOOD PRODUCTS."

IN ACCORDANCE WITH THE ACT OF CONGRESS APPROVED JUNE 3, 1902, 32 STAT. L. 286, 296 AND ACTS SUPPLEMENTAL THERETO

"FOR THE GUIDANCE OF THE OFFICIALS OF THE VARIOUS STATES AND OF THE COURTS OF JUSTICE."

Reference	CANDY	CHOCOLATE

CIRCULAR No. 10
of the Department of Agriculture.

Issued Nov. 20, 1903.

NOTE:—This is the first publication of the series known as "Standards of Purity for Food Products."

"3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions." (p. 3.)

"6. The names of food products herein defined usually agree with existing American trade or manufacturing usage, but where such usage is not clearly established or where trade names confuse two or more articles for which specific designations are desirable, prefer-

CANDY.

Definition.

"1. *Candy* is a product prepared from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials.

Standard.

"2. *Standard candy* is candy containing no terra alba, barytes, talc, chrome yellow, or other mineral substances or poisonous colors or flavors or other ingredients injurious to health." (p. 8.)

COCOA AND COCOA PRODUCTS.

Definitions.

"3. *Chocolate, plain or bitter chocolate liquor*, is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ.

Standard.

"*Standard chocolate* is chocolate containing not more than three (3) per cent of ash insoluble in water, three and fifty hundredths (3.50) per cent of crude fiber and nine (9) per cent of starch nor less than forty-five (45) per cent of cocoa fat.

Definition.

"4. *Sweet chocolate* and *chocolate coatings* are plain chocolate mixed with sugar

* Respondents' Exhibit No. 13 (Record, page 46).

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE
ence is given to one of the several trade names applied." (p. 5.) "For the primary definitions and standards and for the compilation of data for standards and consistent assistance in the revision of schedules the committee is greatly indebted to the following persons: * * * Charles A. Crampton, M. D., chemist of the Bureau of Internal Revenue, referee on beverages, including cocoa and cocoa products; * * *" (p. 2.)		(sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. *Standard.* "*Standard sweet chocolate and standard chocolate coating* are sweet chocolate and chocolate coating containing in the sugar—and fat—free residue no higher percentage of either ash, fiber, or starch than is found in the sugar—and fat—free residue of plain chocolate." (p. 12.)

CIRCULAR No. 13
of the Department of Agriculture.

Issued Dec. 20, 1904.
(Supplemental to Circular No. 10.)

CANDY.

"1. *Candy* is a product made from a saccharine substance or substances with or without the addition of harmless coloring, flavoring, or filling materials and contains no terra alba, barytes, talc, chrome yellow,

COCOA AND COCOA PRODUCTS.

"3. *Chocolate, plain* or *bitter;* or *chocolate liquor,* is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents except the germ, and contains not more than three (3) per

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE
"3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions." (p. 5.) "6. The names of food products herein defined usually agree with existing American trade or manufacturing usage, but where such usage is not clearly established or where trade names confuse two or more articles for which specific designations are desirable, preference is given to one of the several trade names applied." (p. 5.)	or other mineral substances, or poisonous colors or flavors, or other ingredients injurious to health." (p. 9.)	cent of ash insoluble in water, three and fifty hundredths (3.50) per cent of crude fiber, and nine (9) per cent of starch, and not less than forty-five (45) per cent of cocoa fat. "4. *Sweet chocolate* and *chocolate coatings* are plain chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials, and contain in the sugar- and fat-free residue no higher percentage of either ash, fiber, or starch than is found in the sugar- and fat-free residue of plain chocolate." (p. 12.)

CIRCULAR No. 17
of the Department of Agriculture.
Issued March 9, 1906.
(Supplemental to Circular No. 13.)

NOTE:—This circular covers only "Fruit and Fruit Products," "Flavoring Extracts," "Edible Vegetable Oils" and "Salt."

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE
CIRCULAR No. 19 of the Department of Agriculture. Issued June 26, 1906. (Supplemental to Circulars Nos. 13 and 17.) In the preparation of this circular (No. 19) the Secretary had, in addition to his other advisors, the expert counsel of the Interstate Food Commission and it is stated (p. 3) that certain changes have been introduced in the schedules "for the purpose of securing increased accuracy of expression." "3. The definitions are so framed as to exclude from the articles defined substances not included in the definitions." (p. 4.) "6. The names of food products herein defined usually agree with existing American trade or manufacturing usuage; but where such usuage is not clearly established or where trade names confuse two or more articles for which specific designations are desirable, preference is given to one of the several trade names applied." (p. 4.)	CANDY. "1. *Candy* is a product made from a saccharine substance or substances with or without the addition of harmless coloring, flavoring or filling materials and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug." (pp. 10 and 11.)	COCOA AND COCOA PRODUCTS. "3. *Chocolate, plain chocolate, bitter chocolate, chocolate liquor, bitter chocolate coatings,* is the solid or plastic mass obtained by grinding cocoa nibs without the removal of fat or other constituents, except the germ, and contains not more than three (3) per cent of ash soluble in water, three and fifty hundredths (3.50) per cent of crude fiber, and nine (9) per cent of starch, and not less than forty-five (45) per cent of cocoa fat. "4. *Sweet chocolate, sweet chocolate coatings,* chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials, and contains in the sugar- and fat-free residue no higher percentage of either ash, fiber, or starch than is found in the sugar- and fat-free residue of chocolate." (p. 17.)

DEFINITIONS—(Continued).

AUTHORIZED BY ACT OF CONGRESS FOR GUIDANCE OF THE COURTS OF JUSTICE.

Reference	CANDY	CHOCOLATE.
CIRCULAR No. 195 of the Department of Agriculture. Issued May 14, 1919. (Supplemental to Circulars Nos. 13, 17 and 19.)	CANDY. "1. **Candy** is a product made from a saccharine substance or substances, with or without the addition of harmless coloring, flavoring, or filling materials, and contains no terra alba, barytes, talc, chrome yellow, or other mineral substances, or poisonous colors or flavors, or other ingredients deleterious or detrimental to health, or any vinous, malt, or spirituous liquor or compound, or narcotic drug." (p. 11.)	CACAO PRODUCTS. "3. **Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings,** is the solid or plastic mass obtained by grinding cacao nibs without the removal of fat or other constituents except the germ. "4. **Chocolate, plain chocolate, bitter chocolate, chocolate liquor, chocolate paste, bitter chocolate coatings,** contains not more than three per cent (3%) of ash insoluble in water, three and fifty hundredths per cent (3.50%) of crude fiber, nine per cent (9%) of cacao starch, and not less than forty-five per cent (45%) of cacao fat. "5. **Sweet chocolate, sweet chocolate coatings,** is chocolate mixed with sugar (sucrose), with or without the addition of cocoa butter, spices, or other flavoring materials. "6. **Sweet chocolate, sweet chocolate coatings,** contains in the sugar and fat-free residue no higher percentage of ash, fiber or starch than is found in the sugar and fat-free residue of chocolate." (p. 18.) "11. **Milk chocolate, milk cocoa, sweet milk chocolate,** or **sweet milk cocoa,** respectively, is chocolate, cocoa, sweet chocolate, or sweet cocoa, which contains not less than twelve per cent (12%) of whole milk solids in the finished product." (p. 19.)

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LEGISLATIVE HISTORY*

SHOWING REFERENCES BY CONGRESS TO CHOCOLATE, *EO NOMINE*, AS CONSTANTLY DISTINGUISHED FROM CANDY IN THE FEDERAL REVENUE STATUTES FROM THE YEAR 1792 TO PRESENT DATE.

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	**Aug. 10, 1790.** 1 Stat. L. 180. 1st Congress Sess. II, Chap. 39.	"Sugar *candy*,*** ten per centum ad valorem." (p. 181.)		"all fruits and *comfits*,***ten per centum ad valorem." (p. 181.)	
Tariff Act.	**May 2, 1792.** 1 Stat. L. 259. 2nd Congress Sess. I, Chap. 27.				"***Chocolate***, per pound, three cents." (p. 259.)
Tariff Act.	**June 7, 1794.** 1 Stat. L. 390. 3rd Congress Sess. I, Chap. 54.	"Sugar *candy*," five per cent. ad valorem in addition to existing tax. (p. 391.)		"all fruits and *comfits*," five per cent. ad valorem. (p. 391.)	
Tariff Act.	**Mar. 3, 1797.** 1 Stat. L. 503. 4th Congress Sess. II, Chap. 10.	"Sugar *candy*,*** nine cents per pound." (p. 504.)			

* Respondents' Exhibit No. 12 (Record, page 46).

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Tariff Act. (Regulating allowance for tare in computing weight.)	Mar. 2, 1799. 1 Stat. L. 627. 5th Congress Sess. III, Chap. 22.	"Sugar *candy* in boxes, ten per cent." (p. 671.) (allowance for tare—not tax.)			"*Chocolate*, in boxes, ten per cent." (p. 671.) (allowance for tare—not tax.)
Tariff Act.	May 13, 1800. 2 Stat. L. 84. 6th Congress Sess. I, Chap. 66.	"Sugar *candy*," 2½ cents per pound in addition to existing tax. (p. 84.)			
Tariff Act.	Apr. 27, 1816. 3 Stat. L. 310. 14th Congress Sess. I, Chap. 107.	"Sugar *candy*, twelve cents per pound." (p. 312.)		"*comfits* or *sweetmeats*, preserved in sugar or brandy" 30% ad valorem. (p. 311.)	"*Chocolate*, three cents per pound." (p. 311.)
Tariff Act.	May 22, 1824. 4 Stat. L. 25. 18th Congress Sess. I, Chap. 136.				"On *chocolate*, four cents per pound." (p. 28.)
Tariff Act.	July 14, 1832. 4 Stat. L. 583. 22nd Congress. Sess. I, Chap. 227.			"*comfits* and *sweetmeats*, of all kinds, preserved in sugar or brandy." (p. 589.)	

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Tariff Act.	**Aug. 30, 1842.** 5 Stat. L. 548. 27th Congress Sess. II, Chap. 270.	"Sugar ***candy***, six cents per pound." (p. 558.)	"on *confectionery* of all kinds, not otherwise specified, twenty-five per cent. ad valorem." (p. 558.)	"on *comfits*, on *sweetmeats*, or fruits preserved in molasses, sugar or brandy" 25% ad valorem. (p. 558.)	"***Chocolate***, four cents per pound." (p. 558.)
Tariff Act.	**July 30, 1846.** 9 Stat. L. 42. 29th Congress Sess. I, Chap. 74.		"*confectionery* of all kinds not otherwise provided for;" 30% ad valorem. (p. 45.)	"*comfits*, *sweetmeats*, or fruit preserved in sugar, brandy or molasses," 40% ad valorem. (p. 44.)	"***Chocolate***" 20% ad valorem. (p. 47.)
Combined Tariff and Internal Revenue Act.	**Mar. 2, 1861.** 12 Stat. L. 178. 36th Congress Sess. II, Chap. 68.	"Sugar ***candy***, four cents per pound." (p. 180.)	"*confectionery* of all kinds, not otherwise provided for, thirty per cent ad valorem." (p. 180.)	"*comfits*, *sweetmeats*, or fruits preserved in sugar, brandy or molasses, not otherwise provided for" 30% ad valorem. (p. 191.)	"***Chocolate***" 20% ad valorem. (p. 189.)
Tariff Act.	**Aug. 5, 1861.** 12 Stat. L. 292. 37th Congress Sess. I, Chap. 45.	"Sugar ***candy***, six cents per pound." (p. 292.)			"***Chocolate***, six cents per pound." (p. 592.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Tariff Act.	**Dec. 24, 1861.** 12 Stat. L. 330. 37th Congress Sess. II, Chap. 2.	"Sugar *candy*, eight cents per pound." (p. 330.)			
War Revenue Act of 1862.	**July 1, 1862.** 12 Stat. L. 432. 37th Congress Sess. II, Chap. 119.	"Sugar *candy*,*** one cent per pound." (p. 463.)	"all *confectionery*, made wholly or in part of sugar, one cent per pound." (p. 463.) also:— "*Confectioners* shall pay ten dollars for each license. Every person who sells at retail *confectionery*, *sweetmeats*, *comfits* or other *confects*, in any building, shall be regarded as a *confectioner* under this act." (p. 457.)		"***Chocolate*** and cocoa prepared, one cent per pound." (p. 463.)
Tariff Act.	**July 14, 1862.** 12 Stat. L. 543. 37th Congress Sess. II, Chap. 163.	"Sugar *candy*, not colored, six cents per pound." (p. 544.)	"all other *confectionery*, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored, or in any way adulterated, ten cents per pound." (p. 544.)	"*comfits*, *sweetmeats*, or fruits preserved in sugar, brandy or molasses, not otherwise provided for." 5% ad valorem in addition to existing tax. (p. 556.)	"***Chocolate*** and cocoa prepared, one cent per pound." This is in addition to existing tax. (p. 550.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
War Revenue Act of 1863.	**Mar. 3, 1863.** 12 Stat. L. 713. 37th Congress Sess. III, Chap. 74.	"Sugar *candy*." Tax 2¢ per lb.; 3¢ per lb.; or 5% ad valorem; (same rates as in next column). (p. 717.)	"and all *confectionery* made wholly or in part of sugar, valued at 14 cents per pound or less, 2 cents per pound; when valued at exceeding 14 cents and not exceeding 40 cents per pound, 3 cents per pound; when valued at exceeding 40 cents per pound, or when sold otherwise than by the pound, 5% ad valorem." (p. 717.)		
Tariff Act.	**June 30, 1864.** 13 Stat. L. 202. 38th Congress Sess. I, Chap. 171.	"Sugar *candy*, not colored, ten cents per pound." (p. 202.)	"On all other *confectionery*, not otherwise provided for, made wholly or in part of sugar, and on sugars, after being refined, when tinctured, colored, or in any way adulterated, valued at 30 cents per pound or less, 15 cents per pound. On all *confectionery* valued above 30 cents per pound, or when sold by the box, package or otherwise than by the pound, 50% ad valorem." (p. 202.)		

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
War Revenue Act of 1864.	June 30, 1864. 13 Stat. L. 223. 38th Congress Sess. I, Chap. 173.	"Sugar *candy*." Tax, 2¢ per lb.; 4¢ per lb.; or 10% ad valorem, depending on price for which sold. (p. 266.)	"and all *confectionery* made wholly or in part of sugar at not exceeding 20 cents per pound a duty of 2 cents per pound, exceeding 20 and not exceeding 40 cents per pound, a duty of 4 cents per pound, when exceeding 40 cents per pound or sold by the box, package or otherwise than by the pound a duty of 10% ad valorem." (p. 266). Also:— "*Confectioners* shall pay ten dollars for each license. Every person who sells at retail *confectionery*, *sweetmeats*, *comfits* or other *confects*, in any building, shall be regarded as a *confectioner* under this Act:" (p. 254.)		"On *chocolate* and cocoa prepared, a duty of one and a half cent per pound." (p. 266.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
War Revenue Act of 1866.	July 13, 1866. 14 Stat. L. 98. 39th Congress Sess. I, Chap. 184.	"Sugar *candy*." Tax, 2¢ per lb.; 4¢ per lb.; or 10% ad valorem, depending on price for which sold. (p. 129.)	"and all *confectionery* made wholly or in part of sugar." Tax, 2¢ per lb.; 4¢ per lb.; or 10% ad valorem, depending on price for which sold. (p. 129.) Also:— "*Confectioners* shall pay ten dollars. Every person who sells at retail *confectionery, sweetmeats, comfits* or other *confects*, in any building shall be regarded as a *confectioner*." (p. 118.)		"On *chocolate* and cocoa prepared, a tax of one and a half cent per pound." (p. 130.)
Combined Tariff and War Revenue Act.	July 14, 1870. 16 Stat. L. 256. 41st Congress Sess. II, Chap. 255.				"On *chocolate*, seven cents per pound." An import duty. (p. 262.)
Tariff Act.	June 6, 1872. 17 Stat. L. 230. 42nd Congress Sess. II, Chap. 315.				"On *chocolate*, five cents per pound." (p. 231.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Combination of War Revenue and Tariff Acts.	Mar. 3, 1883. 22 Stat. L. 488. 47th Congress Sess. II, Chap. 121.	"Sugar ***candy***, not colored, five cents per pound." (Under "Schedule E, Sugar," p. 502.)	"All other *confectionery*, not specifically enumerated or provided for in this act, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored, or in any way adulterated valued at 30 cents per pound or or less, 10 cents per pound. *Confectionery* valued at 30 cents per pound, or when sold by the box, package or otherwise than by the pound 50% ad valorem. (Under "Schedule E, Sugar," p. 502.)	"*Comfits, sweetmeats*, or fruits preserved in sugar, spirits, sirup or molasses, not otherwise specified or provided for in this act, and jellies of all kinds, 35% ad valorem." (p. 504.)	"***Chocolate***, two cents per pound." (Under "Schedule G. Provisions." p. 504.)
Tariff Act.	Oct. 1, 1890. 26 Stat. L. 567. 51st Congress Sess. I, Chap. 1244.	"Sugar ***candy***." (Under "Schedule E, Sugar." p. 584.) "Orange peel and lemon peel, preserved or ***candied***, two cents per pound." (p. 587.)	"and all *confectionery*, including *chocolate confectionery* made wholly or in part of sugar, valued at twelve cents or less per pound and on sugars after being refined, when tinctured, colored, or in any way adulterated, five cents per pound."	"*Comfits, sweetmeats* and fruits preserved in sugar, sirup, molasses or spirits not specially provided for in this act, and jellies of all kinds 35% ad valorem." (Under Schedule G, Subsection "Fruits and Nuts." p. 587.)	"***Chocolate*** (other than *chocolate confectionery* and ***chocolate*** commercially known as *sweetened chocolate*) two cents per pound." (Under "Schedule G, Agricultural Products and Provisions." (p. 588.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	(1890—Cont.)		"All other *confectionery*, including *chocolate confectionery*, not specially provided for in this act, fifty per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 534.)		
Tariff Act.	Aug. 27, 1894. 28 Stat. L. 509. 53rd Congress Sess. II, Chap. 349.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR." p. 521.) "Orange peel and lemon peel, preserved or *candied*, thirty per cent. ad valorem." (p. 524.)	"and all *confectionery*, made wholly or in part of sugar, and on sugars after being refined, when tinctured, colored or in any way adulterated, thirty-five per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 521.)	"*Comfits, sweetmeats*, and fruits preserved in sugar, sirup or molasses, not specially provided for in this Act, prepared or desiccated cocoanut or copra, and jellies of all kinds, thirty per cent. ad valorem." (Under Schedule G, Subsection "FRUITS AND NUTS. p. 524.)	"*Chocolate, sweetened, flavored, or other*, valued at 35 cents per pound or less 2 cents per pound; valued at exceeding 35 cents per pound and *chocolate confectionery* 35% ad valorem." (Under "SCHEDULE G, AGRICULTURAL PRODUCTS AND PROVISIONS." p. 524.)
Tariff Act.	July 24, 1897. 30 Stat. L. 151. 55th Congress Sess. I, Chap. 11.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR." p. 168.) "Orange peel or lemon peel, preserved, *candied*	"and all *confectionery* not specially provided for in this Act, valued at fifteen cents per pound or less, and on sugars after being refined, when tinctured, colored or in any	"*Comfits, sweetmeats*, and fruits preserved in sugar, molasses, spirits, or in their own juices, not specially provided for in this Act one cent per	"*Chocolate* and *cocoa*, prepared or manufactured, not specially provided for in this Act." Tax, 2½¢ per lb.; 2½¢ per lb. plus 10% ad valorem; 5¢

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	(1897—Cont.)	or dried***two cents per pound." (p. 172.)	way adulterated, four cents per pound and fifteen per centum ad valorem; valued at more than fifteen cents per pound fifty per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 168.)	pound and thirty-five per centum ad valorem." (Under Schedule G, Subsection "FRUITS AND NUTS." p. 171.)	per lb. plus 10% ad valorem; or 50% ad valorem, depending on price for which sold. (Under "SCHEDULE G, AGRICULTURAL PRODUCTS AND PROVISIONS." p. 172.)
Tariff Act,	Aug. 5, 1909. 36 Stat. L. 11. 61st Congress Sess. I, Chap. 6.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR." p. 34.) "Orange peel or lemon peel, preserved, *candied*, or dried," etc. (p. 38.)	"and all *confectionery* not specially provided for in this section, valued at fifteen cents per pound or less, and on sugars after being refined, when tinctured, colored or in any way adulterated, four cents per pound and fifteen per centum ad valorem; valued at more than fifteen cents per pound, fifty per cent. ad valorem." (Under "SCHEDULE E, SUGAR." p. 34.)	"*Comfits, sweetmeats*, and fruits of all kinds preserved or packed in sugar, or having sugar added thereto, or preserved or packed in molasses, spirits or their own juices, * * * one cent per pound and thirty-five per cent. ad valorem." (Under Schedule G, listed with Fruits, etc., p. 37-38.)	"*Chocolate* and cocoa, prepared and manufactured, not specially provided for in this section, valued at not over fifteen cents per pound, two and a half cents per pound; valued above 15¢ and not over 24¢ per lb. 2½¢ per lb. and 10% ad valorem; valued above 24¢ and not above 35¢ per lb., 5¢ per lb. and 10% ad valorem, valued above 35¢ per

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	(1909—Cont.)		Also:— "biscuits, wafers, cakes and other baked articles, by whatever name known, composed in whole or in part of eggs, or any kind of flour or meal, or other material, when sweetened with sugar, honey, molasses or other material or combined with *chocolate, nuts, fruit,* or *confectionery* of any kind, or both so sweetened and combined, and without regard to the component material of chief value, valued at 15¢ per lb. or less, 3¢ per lb. and 15% ad valorem; valued at more than 15¢ per lb. 50% ad valorem." (p. 36.)		lb., 50% ad valorem * * *; powdered cocoa, *unsweetened*, 5¢ per lb." (Under "SCHEDULE G, AGRICULTURAL PRODUCTS AND PROVISIONS." p. 39.) "***Chocolate,***" mentioned as one separate element in a confection combination. (p. 36.)
Tariff Act.	July 26, 1911. 37 Stat. L. 4. 62nd Congress Sess. I, Chap. 3.	"***Candied*** peel." "***Candied*** popcorn." "***Candied*** nuts." "***Candied*** fruits." "Sugar ***candy***." 32½% ad valorem. (p. 4.)	"*confectionery* of all kinds," 32½% ad valorem. (p. 4.) "Biscuits, wafers, cakes, and other baked articles, composed in whole or in part of eggs or any kind of flour or meal, when combined with *chocolate, nuts, fruits* or *confectionery*." (p. 4.)		"***Chocolate,***" mentioned as one separate element in a confection combination. (p. 4.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

TYPE OF STATUTE	STATUTE DATE AND REFERENCE	CANDY	CONFECTIONERY	COMFITS AND SWEETMEATS	CHOCOLATE
Tariff Act.	Oct. 3, 1913. 38 Stat. L. 114. 63rd Congress Sess. I, Chap. 16.	"Sugar *candy*." (Under "SCHEDULE E, SUGAR, MOLASSES AND MANUFACTURES OF." (p. 131.) "Orange peel or lemon peel, preserved, *candied* or dried*** citron or citron peel, preserved, *candied* or dried 2 cents per pound." (p. 134.)	"and all *confectionery* not specially provided for in this Section, valued at fifteen cents per pound or less two cents per pound; valued at more than fifteen cents per pound twenty-five per centum ad valorem." (Under "SCHEDULE E, SUGAR, MOLASSES AND MANUFACTURES OF." p. 131.) Also:— "Biscuits, bread, wafers, cakes and other baked articles, and puddings, by whatever name known, containing *chocolate, nuts, fruit* or *confectionery* of any kind, and without regard to the component material of chief value, 25% ad valorem." (Under Schedule G. p. 132.)	"*comfits, sweetmeats* and fruits of all kinds preserved or packed in sugar, or having sugar added thereto or preserved or packed in molasses, spirits or their own juices*** twenty per centum ad valorem." (Under Schedule G, with fruits, etc. p. 134.)	"*Unsweetened chocolate* and cocoa, prepared or manufactured not specially provided for in this section, 8% ad valorem. *Sweetened chocolate* and cocoa, prepared or manufactured, not specially provided for in this section valued at 20 cents per pound or less, 2 cents per pound; valued at more than 20 cents per lb., 25% ad valorem." Also:— "*Chocolate,*" mentioned as one separate element in a confection combination. (p. 132.)

LEGISLATIVE HISTORY, CHOCOLATE, *EO NOMINE*—(Continued).

Type of Statute	Statute Date and Reference	CANDY	Confectionery	Comfits and Sweetmeats	CHOCOLATE
Revenue Act of 1918.	**Feb. 24, 1919.** 40 Stat.L.1057. 65th Congress Sess. III, Chap. 18.	"***Candy***, 5 per centum." (p. 1122.)			
Revenue Act of 1921.	**Nov. 23, 1921.** 42 Stat. L. 227. 67th Congress Sess. I, Chap. 136.	"***Candy***, 3 per centum." (p. 292.)			
Tariff Act.	**Sept. 21, 1922.** 42 Stat. L. 858. 67th Congress Sess. II, Chap. 356.	"Sugar ***candy***." (Under "Schedule 5, Sugar, Molasses and Manufactures of." p. 890.) "Citron peel*** ***candied***, or otherwise prepared." (p.893.) "Orange and lemon peel*** ***candied***, or otherwise prepared." (p.893.)	"and all *confectionery* not specially provided for, and sugar after being refined, when tinctured, colored, or in any way adulterated, 40% ad valorem." (Under "Schedule 5, Sugar, Molasses and Manufactures of." p. 890.) "Biscuits, wafers, cake, cakes, and similar baked articles, and puddings, all the foregoing by whatever name known, whether or not containing *chocolate, nuts, fruits* or *confectionery* of any kind, 30% ad valorem." (Under Schedule 7. p. 893.)		"***Chocolate*** and cocoa, sweetened or unsweetened, powdered or otherwise prepared, 17½% ad valorem, but not less than 2 cents per pound." (Under "Schedule 7, Agricultural Products and Provisions." p. 896.) "***Chocolate***," mentioned as a separate element in a confection combination. (p. 893.)

TREASURY REGULATIONS 47, ARTS. 22 AND 19, ALSO SUGGESTED STATUTORY DEFINITION SUBMITTED TO CONGRESS BY SECRETARY OF TREASURY BUT NOT ADOPTED BY CONGRESS.

COLUMN 1.

ARTICLE 22, REGULATION 47 UNDER REVENUE ACT OF 1918. ISSUED BY COMMISSIONER OF INTERNAL REVENUE with approval of SECRETARY OF THE TREASURY MAY 1, 1919. also OFFICE RULING OF COMMISSIONER ISSUED MAY 10, 1919.

"Art. 22. Candy.—Candy within the meaning of the act includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruit and nuts,

COLUMN 2.

DEFINITION WHICH THE SECRETARY OF THE TREASURY BY HIS LETTER OF NOV. 3, 1919 SUGGESTED THAT CONGRESS incorporate in REVENUE ACT OF 1921.

"Strike out subdivision (9) and insert:

Candy, 5 per centum. Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gum drops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges or Italian creams, nougats, peanut brittle, sugared almonds, chocolate covered fruits and nuts, glace or candied fruits and nuts

COLUMN 3.

REVISED ARTICLE 22, REGULATION 47 UNDER REVENUE ACT OF 1918. ISSUED BY COMMISSIONER OF INTERNAL REVENUE with approval of SECRETARY OF THE TREASURY DEC. 27, 1920.

"Art. 22. Candy.—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glace or candied fruits and nuts

COLUMN 4.

ARTICLE 19, REGULATION 47 UNDER REVENUE ACT OF 1921 ISSUED BY COMMISSIONER OF INTERNAL REVENUE with approval of SECRETARY OF THE TREASURY. JANUARY 6, 1922.

"Art. 19. Candy.—Candy within the meaning of this subdivision—

(a) Includes chocolate creams, bonbons, gumdrops, jelly drops, jelly beans, imperials, caramels, stick candy, lozenges, taffies, candy kisses, wafers, fudges, or Italian creams, nougats, peanut brittle, sugared almonds, chocolate-covered fruits and nuts, glace or candied fruits and nuts

Regulation 47, Art. 22. May 1, 1919.	Letter of Sec. of Treas. Nov. 3, 1919.	Revised Regulation 47, Art. 22. Dec. 27, 1920.	Regulation 47, Art. 19. Jan. 6, 1922.
	not specified in paragraph (*b*) of this subdivision,	not specified in paragraph (*b*) of this subdivision;	not specified in paragraph (*b*) of this subdivision;
popcorn and other cereals or cereal products	popcorn and other cereals or cereal products not specified in paragraph (*b*) of this subdivision,	popcorn and other cereals or cereal products not specified in paragraph (*b*) of this subdivision,	popcorn and other cereals or cereal products not specified in paragraph (*b*) of this subdivision,
mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows,	mixed with or covered with molasses, sugar or other sweetening agent, hard candies, plain and chocolate covered marshmallows,	mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate covered marshmallows;	mixed with or covered with molasses, sugar, or other sweetening agent; hard candies; plain and chocolate covered marshmallows;
candy cough drops and		candy cough drops, sold in bulk and without remedial claims (see Art. 16 Regulations 51);	candy cough drops, sold in bulk and without remedial claims;
sweetened licorice not taxed as cough drops,	sweetened licorice not taxed as cough drops under section 907,	sweetened licorice not taxed as cough drops under section 907;	sweetened licorice;
sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts;	*sweet chocolate and sweet milk chocolate whether plain or mixed with fruit or nuts;*	*sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts,* not specified in paragraph (*b*) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (*b*) of this subdivision;	*sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts,* not specified in paragraph (*b*) of this subdivision; maple sugar mixed with fruit, nuts, etc., not specified in paragraph (*b*) of this subdivision;

Regulation 47, Art. 22. May 1, 1919.	Letter of Sec. of Treas. Nov. 3, 1919	Revised Regulation 47, Art. 22. Dec. 27, 1920.	Regulation 47, Art. 19. Jan. 6, 1922.
and all similar articles however designated:	and all similar articles however designated;	and all similar articles however designated;	and all similar articles however designated;
	but	but	but
It does not include, however, cereal breakfast foods, cake and pastries, nor bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.	(*b*) Does not include cereal breakfast foods, cake, and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste.	(*b*) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste,	(*b*) Does not include cereal breakfast foods, cake and pastries, bitter chocolate which needs the addition of sugar before it becomes pleasing to the taste,
		powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste,	powdered chocolate, maple sugar or sirup not mixed with nuts, etc., marshmallow paste,
If a manufacturer of glace or candied fruits at the time the goods are shipped or sold (whichever is prior) has in his possession an order or contract of sale with certificate of the purchaser printed thereon or in writing and permanently attached thereto, showing that such fruits so purchased are to be used in the manufacture of food products, such as ice cream, cakes, and pastries, the sale	nor glace or candied fruits	glace or candied fruit peel and citron, or sweet chocolate, glace or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.	glace or candied fruit peel and citron, or sweet chocolate, glace or candied fruits and nuts sold by the manufacturer under circumstances where it is obvious from the condition of the product, method of packing or from other facts in connection with the sale, that it will not be consumed in the form in which it is then sold.
	purchased for and used in the manufacture of food products such as ice cream, cakes and pastries;		

Regulation 47, Art. 22. May 1, 1919.	Letter of Sec. of Treas. Nov. 3, 1919.	Revised Regulation 47, Art. 22. Dec. 27, 1920.	Regulation 47, Art. 19. Jan. 6, 1922.
thereof shall not be taxable. Where a manufacturer of candy sells in connection with the sale of his own product candy which he has bought from another manufacturer and on which he has performed no further process of manufacture the tax attaches only to such portion of the goods sold as have been manufactured by him." The Commissioner subsequently ruled in response to telegraphic inquiry under date of May 10, 1919, as follows:— "Sweet chocolate sold in parcels of such size and shape that it is commonly purchased and consumed as candy by the general public is taxable as candy, but sweet chocolate sold in large packages not as candy but intended for further manufacturing purposes is not taxable provided the manufacturer has in his possession a certificate of the purchaser in writing showing that the chocolate so purchased is to be used for further manufacturing purposes."		Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items."	Where a manufacturer sells candy which is packed or put up for sale in a fancy or plain box or container the tax is computed upon the selling price of the candy and container, whether the container is billed separately or not. However, where candy is purchased and the purchaser selects a fancy box or container in which the candy is placed the tax attaches to the selling price of the candy and not to the cost of the box. In such cases, if the sale is billed, the container and candy must be billed as separate items."

DICTIONARY DEFINITIONS.

AS FOUND IN THE EDITIONS OF THE DICTIONARIES NAMED IN THE CONGRESSIONAL LIBRARY.

Name of Dictionary.	Date of Publication.	CANDY.	CHOCOLATE.
Dr. Johnson's.	1784–1805		"The cake or mass, made by grinding the kernel of the cacao-nut with other substances."
Universal Pronouncing Dictionary—Wright.			"Chocolate—(Span.)—A paste or cake composed of the kernel of cacao, with other ingredients, usually a little sugar, cinnamon or vanilla. The nut is first ground fine, mixed with the ingredients, and put in a mould; the liquor is made by dissolving chocolate in boiling water."
Oglivie's Imperial Dictionary.	1883	"A solid preparation of sugar or molasses either alone or in combination with other substances, to flavor, color, or give it the desired consistency."	"A paste or cake composed of the kernels of the Theobroma Cacao ground and combined with sugar and vanilla, cinnamon, cloves, or other flavoring substances."
Stormouth's.	1885	"Crystallized sugar, sugar compounded with anything else: v. to boil or dress in sugar; to cover or incrust with sugar; to form sugar into crystals."	"A powder or paste prepared from the beans of the cacao-nut, used in making the beverage so called."

DICTIONARY DEFINITIONS (Continued).

NAME OF DICTIONARY.	DATE OF PUBLICATION.	CANDY.	CHOCOLATE.
Murray's.	1893	"Crystallized sugar made by repeated boiling and slow evaporation, more fully called sugar candy; also any confection made of, or incrusted with this. (In U. S. used more widely than in Great Britain, including toffy, and the like.)"	"A paste or cake composed of the seeds of the cacao-fruit roasted and ground, sweetened and flavored with vanilla and other substances."
Students' Edition of a Standard Dictionary.	1898	"Sugar or molasses, or both, formed into a confection by any means."	"Cacao-seeds roasted and ground and often mixed with sugar and flavoring."
Worcester's.	1908	"Sugar in the form of large crystals deposited from a dense sirup, or of a compact concretion produced by long-continued boiling of a solution of sugar, or of molasses; a conserve of sugar."	"A preparation made of the seeds or nuts of the Theobroma Cacao."
Concise Oxford—Fowler.	1911	"Crystallized sugar made by repeated boiling and slow evaporation."	"(Cake) of cacao-seed paste."
New Universal Graphic —Winston.	1924	"A solid confection of sugar, combined with flavoring or coloring substances."	"A paste of the roasted kernels of the cacao-nut."

DICTIONARY DEFINITIONS (Continued).

NAME OF DICTIONARY.	DATE OF PUBLICATION.	CANDY.	CHOCOLATE.
New Standard Dictionary.	1913–1925	"Sugar or molasses, or both, formed into a confection, usually by boiling; in England, commonly called a sweet, and in Australia, lolly." "Candy, which is made into a variety of forms, is generally flavored and often colored with various substances, and sometimes combined with nuts, chocolate, etc. In England, the word is confined to confections of sugar, those of molasses being called toffy."	"A paste or cake, made of cacao-seeds roasted and ground and often mixed with sugar and some flavoring ingredients."
Webster's New International.	1910–1920–1927	"A more or less solid preparation made by boiling sugar or molasses to the desired consistency, and then crystallizing, molding, or working it into the required shape. It is usually flavored or colored, and often contains fruits, nuts, etc. Also, any sweetmeat made of or coated with, a preparation of sugar or molasses, a piece of confectionery."	"A preparation composed of the roasted seeds of the cacao ground and mixed with other ingredients, usually sugar, and cinnamon or vanilla."

SUPREME COURT OF THE UNITED STATES.

Nos. 426-441.—October Term, 1930.

426 B. D. McCaughn, Collector, Petitioner,
vs.
Hershey Chocolate Co.

427 Est. E. Lederer, Collector, Petitioner,
vs.
Hershey Chocolate Co.

428 Est. B. F. Davis, Collector, Petitioner,
vs.
Hershey Chocolate Co.

429 Est. E. Lederer, Collector, Petitioner,
vs.
Hershey Chocolate Co.

430 B. D. McCaughn, Collector, Petitioner,
vs.
Hershey Chocolate Co.

431 Est. B. F. Davis, Collector, Petitioner,
vs.
Hershey Chocolate Co.

432 Est. B. F. Davis, Collector, Petitioner,
vs.
Klein Chocolate Co.

433 Est. E. Lederer, Collector, Petitioner,
vs.
Klein Chocolate Co.

434 Est. E. Lederer, Collector, Petitioner,
vs.
Klein Chocolate Co.

435 Blakely D. McCaughn, Collector, Petitioner,
vs.
Klein Chocolate Co.

436 Est. E. Lederer, Collector, Petitioner,
vs.
Wilbur Suchard Chocolate Co.

437 Est. E. Lederer, Collector, Petitioner,
vs.
Wilbur Suchard Chocolate Co.

438 Blakely D. McCaughn, Collector, Petitioner,
vs.
Wilbur Suchard Chocolate Co.

439 Est. B. F. Davis, Collector, Petitioner,
vs.
York Chocolate Co.

440 Est. E. Lederer, Collector, Petitioner,
vs.
York Chocolate Co.

441 Blakely D. McCaughn, Collector, Petitioner,
vs.
York Chocolate Co.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[May 18, 1931.]

Mr. Justice STONE delivered the opinion of the Court.

Section 900 of the Revenue Act of 1918, 40 Stat. 1057, 1122, imposed, at varying percentages, an excise tax upon the sales price of enumerated articles, most of which may be characterized as luxuries. The enumeration of the ninth subdivision was, "Candy, 5 per centum". Section 900 (6) of the Revenue Act of 1921, 42 Stat. 227, 292, re-enacted this provision but reduced the tax to 3%. Respondents, manufacturers of "sweet chocolate" and "sweet milk chocolate," brought suits in the District Court for Eastern Pennsylvania, to recover about $8,000,000 of taxes assessed under these sections for the years 1918 to 1924, on the ground that the articles sold are not "candy," sale of which was taxed. On written stipulation of the parties, the cases were tried by the court without a jury. Judgments for petitioners were reversed by the Court of Appeals for the Third Circuit. 42 F. (2d) 408. This Court granted certiorari, 282 U. S. —, October 20, 1930, to resolve the conflict of the decision below with that of the Court of Appeals for the First Circuit, in *Malley* v. *Walter Baker & Co.*, 281 Fed. 41.

The trial court found that sweet chocolate is a solid or plastic mass, made by mixing sugar with chocolate, which is the powdered cacao nib or bean, with or without the addition of flavoring material, and that sweet milk chocolate also contains milk solids; that the type of sweet chocolate manufactured and sold by respondents is commonly sold in small bars, sometimes containing nuts, or in blocks, "attractively dressed up" for sale under names which would appeal to candy consumers, and is usually consumed in the same manner as candy, that is, eaten in small quantities from the hand as a sweetmeat. One of the respondents described its product as a "confection" upon some of its labels and display matter.

Respondents rest their case mainly upon differences in composition of sweet chocolate from that of confectionery, made principally of sugar or molasses, with or without the addition of coloring or flavoring matter, which, it is urged, is alone described by the word "candy". They assert that chocolate is food and candy is not, and hence chocolate cannot be properly described as candy. But it is common knowledge that sugar, also a food, is an ingredient both of candy as thus defined and of sweet chocolate, sometimes to the ex-

tent of 50% or more of the latter, as was conceded on the argument here. We likewise know, as was conceded, that chocolate in a great variety of forms is an important ingredient of what is commonly known as candy, and that pieces of sweet chocolate of the type described by the findings are often included in packages of confectionery commonly sold as candy. These considerations at least suggest that the form and use of sugar compounds, intended for taste gratifying consumption, are quite as important in determining whether they are candy, as their particular composition. See *Malley* v. *Walter Baker & Co., supra*, p. 46.

No doubt the word "candy", in view of its use to designate confections made principally of sugar before the widespread consumption of sweet chocolate preparations as confections or sweetmeats, and as the dictionary suggests, may be used in this narrower and more restricted sense. But it may be, and we think is used, as the dictionary also suggests, in a popular and more general sense, as synonymous with sugar compounds sold and used as confectionery or sweetmeats, and embraces them, as well as candy made chiefly of sugar.

If it were necessary to our decision, in the absence of any controlling legislative history or any suggested plausible reason why a tax on candy, in a general revenue measure taxing luxuries, should be deemed to apply to one type of confectionery and not the other, we should hesitate to say that the word was used in its restricted sense, or to hold that a substance made of sugar and chocolate, a widely known and popular form of confectionery identified, in use and method of distribution, with other types of confectionery known as "candy," was not intended to be taxed. See *DeGanay* v. *Lederer*, 250 U. S. 376, 381; *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 253.

Possible doubts as to the proper construction of the language used should be resolved in the light of its administrative and legislative history. Shortly after the adoption of the 1918 Act, Art. 22 of Regulations 47, May 1, 1919, announced that "Candy within the meaning of the act includes . . . sweet chocolate and sweet milk chocolate, whether plain or mixed with fruit or nuts". This continued to be the ruling of the Treasury Department until the repeal of the tax by § 1100 (a) of the Revenue Act of 1924, 43 Stat. 253, 352. It and later regulations excluded unsweetened chocolate from the tax and, as revised in December, 1920,

the regulation, and also Art. 19 of Regulations 47, January 6, 1922, under the 1921 Act, excluded from the tax all sweet chocolate which obviously would not be consumed in the condition or form in which sold. This was but a recognition that use may be a determining factor in ascertaining what sugar compounds are embraced in the word candy.

The administrative construction was upheld in 1922 by *Malley* v. *Walter Baker & Co., supra*, the only case, other than the present, which has considered it. The provision has been consistently enforced as construed, was re-enacted by Congress in the 1921 Act, and remained on the statute books without amendment until its repeal. Such a construction of a doubtful or ambiguous statute by officials charged with its administration will not be judicially disturbed except for reasons of weight, which this record does not present. See *Brewster* v. *Gage*, 280 U. S. 327, 336; *Universal Battery Co.* v. *United States*, 281 U. S. 580, 583; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378. The re-enactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed. See *National Lead Co.* v. *United States*, 252 U. S. 140, 146. We see no reason for rejecting that construction.

The court below found support for its decision in the fact that various tariff and revenue acts have separately classified candy and chocolate, and respondents make the point here. But it is to be noted that in none of the acts cited does the word candy appear alone, as in the present statute. In the earlier tariff acts the duty was laid on "sugar candy". See Act of August 10, 1790, 1 Stat. 180; Act of June 7, 1794, 1 Stat. 390. In those of August 5, 1909, 36 Stat. 11; October 3, 1913, 38 Stat. 114; and September 21, 1922, 42 Stat. 858, which may be taken as typical, a duty was imposed on importations of "sugar candy and all confectionery not specially provided for" at one rate, and by a different paragraph, on chocolate, at a different rate. The differences in rate made classification necessary; and as the cacao bean is not produced in the United States and sugar is, that fact may be taken to account in a tariff act for the differences both in rate and classification. But a difference in composition, relatively minor so far as it has any bearing on the general character of the product or its use, is of little moment in determining whether the product falls within

or without a single class of luxuries taxed, for revenue only, at a single rate. Similarly, rulings of the Department of Agriculture setting up standards under the Pure Food Laws for the composition of various types of confectionery, including sweet chocolate, throw no light on the present problem.

Nor do we think of significance the fact relied upon here and by the court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in charge of the bill. For reasons which need not be restated, such individual expressions are without weight in the interpretation of a statute. See *Duplex Co.* v. *Deering*, 254 U. S. 443, 474; *Lapina* v. *Williams*, 232 U. S. 78, 90; *United States* v. *Freight Ass'n*, 166 U. S. 290, 318.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.